Supreme Court, U.S.
FILED

93 1230 JAN 28 1994

No. 93-

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVID P. SCHNEIDER,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

JAN HORBALY
5310 Renaissance Court
Burke, Virginia 22015
(703) 978-7909
Counsel for Petitioner

Date: January 28, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10 pp

QUESTIONS PRESENTED

Whether a service member's court-martial was improperly constituted and lacked jurisdiction to try him because an officer, junior in rank to the service member, participated as a juror in the service member's court-martial and voted on his guilt, and then prior to sentencing was dismissed as a juror when the trial judge learned that the officer (1) was junior in rank to the service member being tried, and (2) was serving as a juror on the court-martial in violation of Article 25 of the Uniform Code of Military Justice, 10 U.S.C. § 625(d)(1) (1988).

Whether a court-martial is collaterally estopped from retrying a service member for misconduct for which he was tried in a state court and acquitted.

Whether federalism precludes a general officer from overriding a decision of a state court in domestic matters.

Whether the errors in the serviceman's court-martial and military appellate review amount to a denial of due process in violation of the Fifth Amendment of the Constitution.

LIST OF PARTIES

Plaintiff-Petitioner is David P. Schneider. Defendant-Respondent is the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. State Court	2
B. General Court-Martial	4
C. United States Army Court of Military Review	5
D. United States Court of Military Appeals	6
REASONS FOR GRANTING THE WRIT	7
I. THE PETITIONER'S COURT-MARTIAL LACKED JURISDICTION TO TRY HIM BECAUSE IT WAS IMPROPERLY CONSTITUTED	7
II. THE PETITIONER WAS SUBJECTED TO DOUBLE JEOPARDY BECAUSE HE WAS TRIED BY COURT-MARTIAL FOR THE SAME MISCONDUCT FOR WHICH HE WAS TRIED IN STATE COURT AND ACQUITTED	11
III. FEDERALISM PRECLUDES A GENERAL OFFICER FROM OVERRIDING A DECISION OF A STATE COURT IN DOMESTIC MATTERS CONCERNING CHILD SUPPORT AND MAINTENANCE PAYMENTS	18
IV. ERRORS IN PETITIONER'S COURT-MARTIAL AND MILITARY APPELLATE REVIEW AMOUNT TO A DENIAL OF DUE PROCESS IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION	21
CONCLUSION	24

TABLE OF AUTHORITIES

Cases	Page
Ashe v. Swenson, 397 U.S. 436 (1970)	13, 15
Bartkus v. Illinois, 359 U.S. 121 (1959)	12
Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985)	17
Brown v. Ohio, 432 U.S. 161 (1977)	12
Brown v. United States, 547 F.2d 438 (8th Cir.), *cert. denied*, 430 U.S. 937 (1977)	15
Courtney v. Williams, 1 M.J. 267 (CMA 1976)	23
Deming v. McClaughry, 113 F. 639 (6th Cir.), *aff'd*, 186 U.S. 49 (1902)	10
Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944)	14
Grady v. Corbin, 495 U.S. 508 (1990)	15
Heath v. Alabama, 474 U.S. 82 (1985)	12, 15
Holmgren v. United States, 217 U.S. 509 (1910)	22
Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820)	16
McClaughry v. Deming, 186 U.S. 49 (1902)	9
Medina v. California, 112 S.Ct. 2572 (1992)	11
Nix v. Whiteside, 475 U.S. 157 (1986)	13
People v. Ward, 72 Ill.2d 379, 381 N.E.2d 256 (1978)	14
Runkle v. United States, 122 U.S. 543 (1887)	10
Schneider v. Schneider, No. 90DR303 (Leavenworth Co., Kan. Dist. Ct., March 12, 1991)	4
Solorio v. United States, 483 U.S. 435 (1987)	16
State v. Schneider, No. CR189-1592-FX (Platte Co., Mo., Cir. Ct. 1990)	3
United States v. Cuellar, 27 M.J. 50 (CMA 1988), *cert. denied*, 493 U.S. 811 (1989)	6, 12
United States v. Emerson, 1 USCMA 43, 1 CMR 43 (1951)	11
United States v. Ezell, 6 M.J. 307 (CMA 1979)	23
United States v. Facchini, 374 F.2d 638 (9th Cir. 1989) (*en banc*)	22
United States v. Grostefon, 12 M.J. 431 (CMA 1982)	6
United States v. Herring, 916 F.2d 1543 (11th Cir. 1990)	22
United States v. Hicks, 24 M.J. 3 (CMA), *cert. denied*, 484 U.S. 827 (1987)	13

TABLE OF AUTHORITIES—Continued

Page

United States v. Hooten, 12 USCMA 339, 30 CMR 339 (1961) 13
United States v. Lallande, 22 USCMA 170, 46 CMR 170 (1973) 19
United States v. Lonetree, 35 M.J. 396 (CMA 1992) 22
United States v. Quigley, 35 M.J. 345 (CMA 1992) 6
United States v. Schneider, —— M.J. —— (No. 67,806/AR, CMA 1993) 6
United States v. Schneider, 34 M.J. 639 (ACMR 1992) 5
United States v. Sousley, 453 F. Supp. 754 (W.D. Mo. 1978) 15
United States v. Thompson, 517 F. Supp. 1214 (E.D. Ark. 1981) 15
United States v. Warren, 13 M.J. 278 (CMA 1982) 13
United States v. Williams, 341 U.S. 58 (1951) 14
Williamson v. Williamson, 247 GA. 280, 275 S.E.2d 42 (1981), *cert. denied*, 454 U.S. 1097 (1982) 18

Statutes

U.S. CONST., Art. III 23
U.S. CONST., Amend. 5 2
Art. 25(d)(1), 10 U.S.C. § 825(d)(1) (1988) 2, 8
Art. 36(a), 10 U.S.C. § 836(a) (1988) 23
Art. 60(c), 10 U.S.C. § 860(c) (1988) 19
Art. 66, 10 U.S.C. § 866 (1988) 6
Art. 67a(a), 10 U.S.C. § 867a(a) (Supp. 1992) 2
18 U.S.C. § 1001 (1988) 22
28 U.S.C. § 1259(3) (1986) 2
40 MO. REV. STAT. ANN., § 558.011.1(1) (1979) 3
40A MO. REV. STAT. ANN., § 565.050 (1979) 3

TABLE OF AUTHORITIES—Continued

Rules Page

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984 ..... *passim*

Regulations

Legal Services: Military Justice, ARMY REGULATION 27-10 (Jan. 25, 1990) 22

Personal Affairs; Family Support, Child Custody and Paternity, ARMY REGULATION 608-99 (Nov. 4, 1991) 19

Miscellaneous

STANDARDS RELATING TO THE APPELLATE COURTS 46 (1977) 6

P. BATOR, P. MISHKIN, D. MELTZER & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1460-64 (3rd ed. 1988) 20

W. DOUGLAS, THE RIGHT OF THE PEOPLE 101 (1950) 21

F. GILLIGAN & F. LEDERER, COURT-MARTIAL PROCEDURE 7-60.00 (1991) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-

DAVID P. SCHNEIDER,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR A WRIT OF CERTIORARI

David P. Schneider petitions for a writ of certiorari to review an opinion and judgment of the United States Court of Military Appeals entered on September 30, 1993. The United States Court of Military Appeals affirmed the opinion and judgment of the United States Army Court of Military Review which upheld the findings and sentence in Major Schneider's general court-martial.

OPINIONS BELOW

The decision of the Missouri Circuit Court which acquitted Major David P. Schneider of a class A felony assault in his wife's seven-story fall is not reported. The Action of the Convening Authority, Lieutenant General Leonard P. Wishart III, approving the findings and sentence in Major Schneider's general court-martial is not reported. It appears in the Appendix at 38a. The Joint Entry of Divorce entered on March 12, 1991 by the District Court of Leavenworth County, Kansas, is unreported.

It appears in the Appendix at 31a. The decision of the United States Army Court of Military Review is reported at 34 M.J. 639 (ACMR 1992). It appears in the Appendix at 19a. The decision of the United States Court of Military Appeals is unreported. It appears in the Appendix at 1a.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867a(a) (Supp. 1992) and 28 U.S.C. § 1259(3) (1968). The judgment of the United States Court of Military Appeals was entered on September 30, 1993. An order (A-430) was entered on November 23, 1993 extending the time to file this petition for a writ of certiorari until January 28, 1994.

STATUTES INVOLVED

Article 25(d)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 825(d)(1) (1988) provides:

> When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

The Fifth Amendment to the Constitution of the United States provides:

> No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. State Court

Petitioner was prosecuted in 1990 in state court in Platte County, Missouri, on a charge of class A felony assault alleged to have occurred in connection with injuries his wife sustained in a seven-story fall at the Embassy Suites Hotel, Tiffany Springs, Missouri, on November 4, 1989. The information charged:

> [T]hat David P. Schneider, in violation of Section 565.050 [Revised Missouri Statutes], committed the class A felony of assault in the first degree, punishable upon conviction under Section 558.011.1(1), [Revised Missouri Statutes], in that on or about November 4, 1989, in the County of Platte, State of Missouri, the defendant attempted to kill or cause serious bodily injury to Deborah A. Schneider by pushing her from the eighth floor hallway onto the floor below, approximately seventy (70) feet, and in the course thereof, inflicted serious physical injury on her.

First Amended information, *State v. Schneider*, No. CR189-1592-FX (Platte Co., Mo., Cir. Ct. filed June 11, 1990). The Army was in direct contact with the state prosecutor (R. 33-34), had personnel attend open hearings in the state case (R. 34, 36, 69, 73-75), and assisted in the state's efforts to obtain evidence with which to convict Petitioner (R. 35). A Criminal Investigation Division (CID) officer was present at the joint interrogation of witnesses (R. 37, 41-42). At the request of local police, CID interviewed a prosecution witness in California (R. 50), and reported the results back to the local police (R. 52). Evidence relating to that witness was in fact introduced in the state trial (R. 39). CID aided local police investigative efforts concerning medical records and information pertaining to the event that led up to the incident (R. 43, 52-53, 57-58), and in obtaining demonstrative evidence (a toilet tank lid) for use in the state trial (R. 49-50). Without being asked, CID furnished telephone bills to the police (R. 58).

After a jury trial, Petitioner *was acquitted* of the class A felony assault charge in state court.

The Schneiders, who have two children, were divorced by the District Court of Leavenworth County, Kansas, on March 12, 1991. The court entered a decree awarding Mrs. Schneider maintenance and child support. Among other things, the decree requires Petitioner to pay 40%

of his income as child support until the children reach majority or pending further order of the court, and 25% of his income as maintenance for 120 months unless Mrs. Schneider predeceases him, remarries or cohabits. *Schneider v. Schneider,* N. 90DR303 (Leavenworth Co., Kans., Dist. Ct., March 12, 1991). Pet. at 33a. Each party bore its own attorney fees in the divorce proceeding.

B. General Court-Martial

After Petitioner was acquitted in the state court, he was tried by a general court-martial at Fort Leavenworth, Kansas, for attempted murder of his wife and for conduct unbecoming an officer by committing perjury and by having an affair with another woman. He was tried on September 28, October 15, November 5, and November 13-17, 1990 by a court of officers. The court convicted Petitioner of the charges and sentenced him to be dismissed from the service, to be confined for twenty-three years, and to forfeit all pay and allowances. Pet. at 20a. The convening authority, Lieutenant General Leonard P. Wishart III, denied Petitioner's request for deferment of the sentence to confinement. On February 15, 1991, General Wishart approved the findings and sentence of the court-martial, but "conditionally suspended the forfeiture in excess of $400 pay per month until execution of the dismissal." [1] The condition required by the General was that Petitioner divert all pay and allowances above $400 to his former wife—a sum in excess of that provided for in the divorce decree subsequently entered by the state court.

> However, the execution of that part of the sentence extending to forfeiture of all pay and allowances in excess of $400.00 per month is suspended until the execution of that part of the sentence extending

[1] *Id.* This means that instead of forfeiting all of his pay and allowances, Petitioner was required to forfeit only $400 per month until he was dismissed from the United States Army.

> to a dismissal from the service, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action, this suspension being on the conditions that the accused continuously claim on an Internal Revenue Service Form W-4, so long as he may legitimately do so, that he is single with two dependents, and that he initiate and maintain a monthly military pay allotment to be paid directly to Deborah A. Schneider in the amount of $2500.00. The remainder of the sentences, except for that part of the sentence extending to a dismissal from the service, will be executed.

Pet. at 38a. The Schneiders' divorce, which was the subject of attention in the local press, had an effective date after this action was entered. The divorce decree calls for Petitioner to pay child support and maintenance at a lesser rate than that provided in the convening authority's action. Pet. at 33a and 38a. As a result, the convening authority was asked to modify the action to conform with the divorce decree, and he refused to do so.

C. United States Army Court of Military Review

The case was heard on mandatory review by the United States Army Court of Military Review on January 21, 1992. For reasons that are unclear, the courtroom was locked and a guard was posted during the argument, preventing some civilians from attending as well as the then Chief of the Defense Appellate Division and other judge advocates from that Division.

On January 31, 1992, the week after hearing oral argument, the Army Court of Military Review issued its decision affirming the findings and sentence imposed in Major Schneider's general court-martial. *United States v. Schneider*, 34 M.J. 639 (ACMR 1992). Pet. at 19a. In addition to the remarkably short time that elapsed between oral argument and the issuance of the court's lengthy decision, there are signs of inattention to detail in the Court's opinion. Specifically, the opinion claims

that the court had "examined the assertions of error personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (CMA 1982) and [found] them also to be without merit." Pet. at 30a. In fact, Petitioner raised no Grostefon issues in his appeal to the Army Court of Military Review.[2]

D. United States Court of Military Appeals

On discretionary review, the United States Court of Military Appeals affirmed. Thirteen of the 15 issues raised by Petitioner were granted and addressed by the Court of Military Appeals. At least a third of the Court's opinion addresses the issue concerning the sufficiency of the evidence with regard to incidents which occurred four years earlier and 1200 miles away.

In addition, the Court holds that "the doctrine of collateral estoppel is inapplicable to prosecutions by a separate sovereign." Pet. at 8a. To support this contention, the Court relies on *United States v. Cuellar*, 27 M.J. 50, 54-55 (CMA 1988), *cert. denied*, 493 U.S. 811 (1989). Pet. at 8a. The Court also holds that it detects "no possibility" of "prejudice" in the fact that one of the court members who voted on Petitioner's guilt during findings portion of the trial was serving on the court in violation of Article 25 of the Uniform Code of Military Justice. Pet. at 12a. Furthermore, the Court holds that the "sen-

---

[2] Given the United States Court of Military Appeals' reaffirmation of the importance of *Grostefon* issues, this denial of *Grostefon* issues where none were raised is evidence of rote decision making which is incompatible with the requirement in Article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866 (1988), which states that issues raised before the Court must be given meaningful review. *United States Quigley*, 35 M.J. 345, 348 (CMA 1992). If "[f]airness and persuasiveness in appellate adjudication require that the parties have . . . confidence that their contentions have been considered," the converse is also true: that a court which purports to deny phantom contentions does not instill confidence that contentions which in fact have been raised are being properly considered. STANDARDS RELATING TO APPELLATE COURTS 46 (1977).

tence handed down by a court-martial is independent of any civil judgment" and that, in any event, even if there is an error in the sentence as modified by the convening authority. Petitioner "does not stand to benefit." Pet. at 12a, 13a.

Petitioner remains in confinement at the United States Disciplinary Barracks at Fort Leavenworth, Kansas.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. Lack of Court-Martial Jurisdiction

The first reason the Supreme Court should grant the petition for a writ of certiorari in this case is because the court-martial lacked jurisdiction to try Petitioner. In order for the judgment of a court-martial to be valid, the court-martial must have jurisdiction to try the case. This means that the government has the burden in each case to prove the five elements of jurisdiction which Congress has provided for in the Uniform Code of Military Justice.

First, the government must prove that the court-martial is *properly convened*, that is, that the court-martial was convened by an official empowered to convene it. *Second*, the government must prove that the court-martial is *properly constituted*, that is, that the accused is present or his absence is accounted for, that a trial counsel and a defense counsel are detailed to the court and are present; that a military judge is detailed to hear the case and is present; that the court members were personally selected and detailed to the court by the convening authority, are eligible to serve, and are present, or their absence accounted for. *Third*, the government must prove that the court-martial has jurisdiction over the person, that is, an enlistee, an inductee, an officer, a retired member, a national guardsman, a reservist, or in some cases, a civilian; that the court has jurisdiction over the person at the time of trial, and that jurisdiction over the person has not been terminated for any reason. *Fourth*, the government must prove that the court-martial has jurisdiction *over the offense*,

that is, that the offense is a crime under the Uniform Code of Military Justice and that the service member was in a military status when the offense was committed. And, *fifth*, the government must show that the *sentence adjudged is within the maximum permissible punishment authorized by law*, that is, that the sentence is within the limits prescribed by the Code for summary, special or general courts-martial, and that it is not in excess of that which is authorized by the Maximum Punishment Chart in the Manual for Courts-Martial.

In the present case, Petitioner contends that the court-martial which tried him was not properly constituted. During the trial and after findings, the trial judge learned that Major Horrell, one of the court members hearing Petitioner's case was junior in rank to the Petitioner. Article 25(d)(1) of the Uniform Code of Military Justice states that "[w]hen it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." Art. 25(d)(1), U.C.M.J., 10 U.S.C. § 825(d)(1) (1988).

The military judge confirmed that Major Horrell was junior in rank to Petitioner. When the defense counsel learned of her unlawful participation in the case, he presented a motion for a mistrial. Without receiving evidence from the government as to whether the appointment of Major Horrell was unavoidable, the military judge denied the motion for a mistrial. The military judge, however, permitted the defense counsel to challenge Major Horrell. The military judge granted the challenge and removed Major Horrell as a court member from Petitioner's trial. Major Horrell voted on the findings in Petitioner's case, but she did not participate in adjudging the sentence.

The military judge's removal of Major Horrell from the court confirms that she participated in Petitioner's court-martial in violation of Article 25 of the Code and that Petitioner's court-martial was improperly constituted. Major Horrell was an active participant in the court's

sessions and deliberations. She queried witnesses during the trial and obtained clarification of the judge's instructions on findings. *See* App. Ex. XIX-XX, XX, XXXVII, XLI, XLVIII, LIII. R. 735. Clearly, if her presence on the court-martial was not jurisdictional error and her participation in the proceedings was not prejudicial to Petitioner, the military judge would not have dismissed her, but would have permitted her to continue to participate in sentencing on the ground that her participation was not harmful or prejudicial to Petitioner.

In *McClaughry v. Deming*, 186 U.S. 49 (1902), the Supreme Court of the United States granted relief to a petitioner who had been tried by a court-martial which was illegally constituted. In *Deming*, an officer of the Volunteer Army was tried by a court-martial in which the court members consisted of officers from the Regular Army. The Supreme Court held that the petitioner's court-martial was improperly constituted because the federal statute governing trial by courts-martial required that members of the Volunteer Army were to be tried by courts-martial composed of officers from the Volunteer Army, not from the Regular Army. *Id.* at 62-64. The Supreme Court did not hold that the presence of officers from the Regular Army was a waivable by the accused, but instead the Court held that the presence of members who do not meet the requirements of the statute is jurisdictional error.

In his opinion for the Eighth Circuit in *Deming*, Judge Walter H. Sanborn correctly identified the five elements of court-martial jurisdiction.[3] Judge Sanborn also cor-

---

[3] [T]he jurisdiction of every court-martial, and hence, the validity of each of its judgments, is conditioned upon these indispensable prerequisites: (1) That it was convened by an officer empowered by the statutes to call it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that purpose; (3) that the court constituted was invested by the acts of

rectly states the general rule that "[t]he absence of any of these indispensable conditions renders the judgment and sentence of a court-martial . . . absolutely void." *Deming v. McClaughry*, 113 F. 609, 650 (8th Cir.), *aff'd*, 186 U.S. 49 (1902).

In discussing generally the subject of court-martial jurisdiction, Judge Sanborn noted that courts-martial are "courts of inferior or limited jurisdiction," and that they are not courts of general jurisdiction. *Id.* There is a "legal presumption," he said, "that courts of general jurisdiction have the power and the authority to make the adjudications which they render, and that their judgments are valid." *Id.* This principle, however, does not apply to "courts of inferior or limited jurisdiction," like courts-martial. Indeed, with regard to such courts, the legal presumption may be said to be just the opposite, namely, that in order for the judgment and sentence of a court-martial of limited jurisdiction to be valid, [its] jurisdiction [must] be clearly and equivocally shown." *Id.* Because a "court-martial is a court of limited jurisdiction" and "a creature of statute," it "follows that the jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned" on the presence of each of the "indispensable prerequisites," namely, the five elements of jurisdiction. *Id.*

In *Runkle v. United States*, 122 U.S. 543 (1887), the Supreme Court states that when a court-martial begins, "it must appear affirmatively and unequivocally that the court was *legally* constituted," that is, that those who are required to be present by statute are indeed present and

---

Congress with power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes

Deming v. McClaughry, 113 F. 639, 650 (8th Cir.), *aff'd*, 186 U.S. 49 (1902). Judge Sanborn joined together in part (3) two of the elements of court-martial jurisdiction, but he nevertheless correctly identified the five elements of court-martial jurisdiction.

that they possess the qualifications necessary to serve as participants in a court martial. *Id.* at 556. If the court-martial is not properly constituted, it does not have jurisdiction to try the accused.

The burden is on the government to establish the five elements of jurisdiction in every court-martial trial. While the element of properly constituted courts-martial is not often litigated, it is an important aspect of military jurisdiction. Indeed, since the beginning, the United States Court of Military Appeals has stated "that military courts-martial must be convened strictly in accordance with [the Uniform Code of Military Justice]." *United States v. Emerson,* 1 USCMA 43, 45, 1 CMR 43, 45 (1951). Because the record in the present case fails to establish clearly that the court-martial was properly constituted, and thus had jurisdiction to try Petitioner, Counsel for Petitioner requests the Court grant the Petition for a Writ of Certiorari.

B. Double Jeopardy

The Petitioner was acquitted in a state court in June. Five months later, in November, Petitioner was retried for the same conduct in a military court. Although fancy words may be used to find shades of meaning, the bottom line is that this is double jeopardy. This action on the part of the military "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California,* 112 S. Ct. 2572 (1992). The military recognized that prosecuting Petitioner on the hotel charge would offend Army policy concerning sequential civilian and military prosecutions. Rather than allowing the case to go forward on the attempted murder and adultery charges, the command elected to frame the hotel charges as perjury. This manipulation of the process was not in keeping with the standards of military justice and should be rejected by this Court.

There are two reasons why this aspect of the military's action should be proscribed. First, the issue of whether Mrs. Schneider accidently or deliberately fell in the hotel was resolved by the acquittal in the Missouri state court. The elements of the perjury specification in the military tribunal's charge was thus collaterally estopped from relitigation. Second, this case deals with an instance of *autrefois acquit*; distinctly different from the *autrefois convict* cases that defined the double jeopardy standard.

The Army Court of Military Review held that "[t]he doctrine of collateral estoppel has not been applied in military criminal law." Pet. at 28a. Further, the decision observes that "prosecution of an offense in state court does not normally bar a federal prosecution of the same criminal matter." *Id.* at 28a. The Court of Military Appeals agreed. *Id.* at 8a.

Petitioner suggests that the real message of *Heath v. Alabama*, 474 U.S. 82 (1985), and *Bartkus v. Illinois*, 359 U.S. 121 (1959), cited by the Army Court of Military Review, has more to do with states' rights than with the pursuit of criminals. The Army Court of Military Review incorrectly uses these decisions as the underpinning for their general belief that they can retry service members at will. Justice O'Connor makes clear in *Heath* that successive prosecutions are barred by the Fifth Amendment if the offenses are the "same." If the Court of Military Review had applied the standard announced in *Brown v. Ohio*, 432 U.S. 161 (1977) to the present case, it would have concluded that it was precluded from picking an equivalent charge on which to retry Petitioner.

Cuellar, which the Court of Military Review relies on, does not stand for the proposition that "collateral estoppel has not been applied in military criminal law." The issue in *Cuellar* was whether evidence of prior acts which Petty Officer Cuellar had been acquitted of in state court could be introduced in his court-martial as uncharged miscon-

duct. While the Court purported to reaffirm the decision in *United States v. Hicks*, 24 M.J. 3 (CMA), *cert. denied*, 484 U.S. 827 (1987), it expressly acknowledged that even this use would be barred by collateral estoppel if the earlier acquittal had been by a court-martial or a federal district court.

In addition, the Court of Military Appeals observes in *United States v. Warren*, 13 M.J. 278 (CMA 1982), that:

> [t]he right to testify in one's own behalf has carried with it amenability to prosecution for perjury. Indeed, a defendant who takes the stand runs the risk that—unless he is acquitted by a jury verdict which under the circumstances of a particular case gives rise to collateral estoppel, *see United States v. Hooten*, 12 U.S.C.M.A. 339, 30 C.M.R. 339 (1981), and *Ashe v. Swenson*, 397 U.S. 438 [(1970)], he may be prosecuted for perjury by reason of the testimony he has given.

Id. at 281 (citations omitted). *See also* 1 F. GILLIGAN & F. LEDERER, COURT-MARTIAL PROCEDURE §7-600.00. Thus, contrary to the decision in the Court of Military Appeals, collateral estoppel definitely has a role to play in military criminal law.

The question is what that role is where the charged offense (rather than "other acts") is a rerun, under a different label, of matter that resulted in an acquittal in a state court. As Justice Blackman observed, concurring in the judgment in *Nix v. Whiteside*, 475 U.S. 157 (1986):

> It is no doubt true that juries sometimes have acquitted defendants who should have been convicted, and sometimes have based their decisions to acquit on the testimony of defendants who lied on the witness stand. It is also true that Double Jeopardy bars the reprosecution of such acquitted defendants, although *on occasion* they can be prosecuted for perjury.

Id. at 186 (emphasis added). The underscored words confirm that the government does not enjoy an unqualified right to try a person who is believed to have given perjured testimony in his or her own defense in a criminal case. If the testimony goes to the heart of an issue that was necessarily determined favorably to the accused in the first case, the prosecution is collaterally estopped from charging that the testimony constituted perjury. *United States v. Williams,* 341 U.S. 68, 64 n.3 (1961).

This principle is illustrated in *Ehrlich v. United States,* 145 F.2d 693 (5th Cir .1944) (dismissing perjury indictment following directed verdict of acquittal on related price control charges) and *People v. Ward,* 72 111.2d 379, 381 N.E.2d 258 (1978) (perjury conviction overturned where new trial had been granted setting aside guilty verdict and no retrial occurred). Petitioner's case is similar to these, except that Petitioner was acquitted by the Missouri jury, rather than the beneficiary of a judge's entry of a directed verdict or a new trial order. The perjury charge in Petitioner's case is a direct assault on the state jury's determination because it goes directly to the crime with which Petitioner was charged with in state court.

At Petitioner's court-martial, it soon became apparent that, as far as the government was concerned, the perjury charge represented a second opportunity to convict Petitioner for allegedly attempting to kill his wife at the hotel. In voir dire, trial counsel tellingly advised the court members:

> The prosecution will place into evidence the testimony of Major Schneider in a civilian trial of a charge relating to *one of the attempted murders.* R. 15 (emphasis added).

An even stronger indicator that the perjury specification was the hotel charge with a fresh coat of paint appears in the instructions on findings. The military judge in-

structed the court members that in order to convict, they must be convinced beyond a reasonable doubt that Petitioner's testimony in the Platte County court, that he accidentally dropped his wife over the railing as she slipped from his grasp, and that he did not intend to harm her, was false (R. 714).

A comparison with the state judge's charge to the civilian jury makes it clear that Petitioner had already stood in judgment for the same conduct. *See* Def. App. Ex. 2. Put another way, at the court-martial, the government sought to prove "the entirety of the conduct" of which Petitioner had been acquitted in the first trial. *See Grady v. Corbin*, 495 U.S. 508 (1990).

This Court cautions that the collateral estoppel doctrine should not be applied "with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Swenson, supra* at 444. In the present case, it is clear that the perjury charged is the same basic matter that was at issue in the Platte County trial. *See e.g., Brown v. United States*, 547 F.2d 438 (8th Cir.), *cert. denied*, 430 U.S. 937 (1977); *United States v Thompson*, 517 F. Supp. 1214 (E.D. Ark. 1981); *United States v. Sousley*, 453 F. Supp. 754 (W.D. Mo. 1978).

Second, the present case is not *"autreofis convict"* but *"autrefois acquit."* There is an important difference between dual sovereignty cases involving a claim that a particular offense has been previously punished and cannot properly be punished a second time, and those in which, as here, the individual has previously been acquitted. A person who has previously been convicted by definition has been found guilty of an offense. Such a person's reasonable expectations of fairness are less at issue than where a person has been acquitted. *See Heath, supra,* at 86. This is a difference which the law can and should take cognizance of in the administration of the protection against double jeopardy.

The final reason that the repetitive prosecution should be rejected is because the status of *in personam jurisdiction* attached to military members as a result of this Court's decision in *Solorio v. United States*, 483 U.S. 435 (1987), unfairly subjects military members to double jeopardy situations in violation of the Fifth Amendment. When the dual sovereignty concept was suggested in dictum in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 75 (1820), the states were not subject to the demands of the Bill of Rights through the Fourteenth Amendment's due process clause. Today that is no longer true. There is a distinctly artificial ring to the notion that the federal government and the states are "dual" sovereigns at all. The judges of each are compelled to take an oath to support the United States Constitution, U.S. CONST., art. VI, cl. 3, and that Constitution makes considerable demands on the states in terms of the conduct of criminal prosecutions. It may be, therefore, that the dual sovereignty doctrine merits continued respect in the context of prosecutions by foreign nations, but its use in the current context elevates a metaphysical proposition into a substantive deviation from the purpose of the double jeopardy clause.

One imagines a citizen of State A (State A has *in personam jurisdiction* similar to the military's) driving to State B. The citizen uses his bare hands to assault a resident of B. After a jury trial in B, the citizen of A is acquitted. Upon returning to A, the citizen is prosecuted by A for the assault. Petitioner submits that this would never be countenanced in the United States today. Yet, this is precisely the situation of Petitioner in the present case.

There is a long history of limiting military involvement in civilian affairs beginning with the Declaration of Independence and continuing in the Constitution, certain acts of Congress, and many decisions of this Court. It is routinely acknowledged that "military enforcement of the

civil laws leaves the protection of vital fourth and fifth amendment rights in the hands of persons who are not trained to uphold these rights." *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985).

Over the years, this Court has controlled carefully the types of issues the military courts are allowed to decide. Such a level of control would never be sanctioned by the States. Yet, the military seeks to hold itself up to the same level as the state courts. Not unlike the Native American Indian tribal courts, the military justice system does not have the same scope as the state, or other federal courts. Not surprisingly, the military has its own Military Rules of Evidence. These conditions do not prevail in the remainder of the court systems that protect the liberties of citizens of this nation. Historically, the military has excused abridgement of these liberties by citing military necessity.

Finally, Petitioner's case presents the Court with an opportunity to reexamine the doctrine of *in personam jurisdiction* as refined by this Court's decision in *Solorio*. When Petitioner became an officer, military jurisdiction was limited in scope. Military jurisdiction was interpreted as being a geographically defined area fixed, usually by surveyors, with finite boundaries. One was either *in* or *out* of a given jurisdiction. By virtue of *Solorio*, the scope of military jurisdiction was greatly expanded. Now wherever Petitioner goes, for the rest of his life (Petitioner has Regular Army status), regardless of how many other jurisdictions he may be standing in, he is subject to military jurisdiction.

While this enables the military to exercise jurisdiction over military members serving in foreign nations, on the high seas, and anywhere in the United States or its territories, it also subjects military members to the multiple jeopardy problem experienced by Petitioner in the present case. Native American Indians are subject to an analogous tribal justice system when on their reservations. Un-

like service members, however, the code to which Native American Indians are subject does not follow them off the reservation and into the local community.

Counsel for Petitioner requests the Court grant his Petition for a Writ of Certiorari because he was tried twice for the same misconduct, once by the State of Missouri and once by the military, in violation of the Double Jeopardy Clause of the Fifth Amendment to the Constitution.

C. Federalism

The third reason the Supreme Court should grant the petition for a writ of certiorari in the present case is because Petitioner's case presents an important question of first impression relating to the relationship between local state courts and the military judicial system.

In the present case, Petitioner contends that the convening authority violated elementary principles of federalism in directing Petitioner to pay more in child support and maintenance than Petitioner was required to pay under the terms of the divorce decree granted to Petitioner and his wife by the state court. The general rule is that the federal government is intent to leave the implementation of child support and alimony obligations to the state courts. *Williamson v. Williamson*, 275 S.E.2d 42, 24 Ga. 260 (1981), *cert. denied*, 454 U.S. 1097 (1982). While not abrogating all responsibility for such domestic actions, the Congress expressly waived the sovereign immunity of the United States in this area to insure that local domestic relations laws would be properly empowered.

In the past, states did not have the power to enforce child support payments across state lines. Under laws enacted by Congress, states now have the primary role in settling domestic issues. In the present case, the action of the convening authority served to nullify the decision of the county court operating under Kansas law. Com-

pare Pet. 33a with Pet. 38a. By establishing himself as a special master with the power to modify the effort of the state court, the convening authority violated the spirit and letter of Army Regulation 608-99 which establishes appropriate levels of spousal support and ignored the decision arrived at by a competent judge acting according to Kansas state law. While the sentence determined by the court-martial may be independent of any other action, the convening authority cannot approve a sentence imposing upon a defendant greater child support and alimony payments than set by the state court in a divorce decree.

In fashioning the suspension condition described above, the convening authority imposed monetary obligations on Petitioner harsher than those subsequently imposed by the divorce decree adjudged by the Kansas court. Petitioner was ordered to pay the higher amount and was threatened with another court-martial for disobedience if he did not comply.

In *United States v. Lallande*, 22 USCMA 170, 46 CMR 170 (1973), the Army Court of Military Review stated that:

> [t]he convening authority's action is based upon federal statute, and his action in approving a court-martial sentence is within his sole discretion. See UCMJ art. 60(c), 10 U.S.C. § 860(c). It is separate from and can be taken without regard to a state court civil action.

Id. at 173, 46 CMR at 173. The Army Court of Military Review's statement ignores the limited purposes of the Uniform Code of Military Justice and its relationship to the American federal system. The UCMJ is not a domestic relations statute. Army regulations contemplate that commanders will not adjudicate family support matters that are finally resolved by state courts by imposing support levels on service members in excess of that provided in state court support agreements. *See Personal*

Affairs: Family Support, Child Custody, and Paternity, AR 608-99, paras. 2-4a(3), 2-10a (Nov. 4, 1991).

Petitioner contends that it is an abuse of discretion for a commander to substitute his views for what is an appropriate support payment for the judgment of a state court of competent jurisdiction which has entered a decree in a domestic relations case where both parties have been represented by counsel. Doing so needlessly injects the federal government into an area which Congress intentionally has left to the states and in which the federal courts have been reluctant to become involved. *See generally* P. BATOR, P. MISHKIN, D. MELTZER & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1460-64 (3rd ed. 1988).

The Supreme Court need not in this case decide the outer limits of a convening authority's power in the absence of a state decree determining the parties' financial obligations to one another, but it should hold that where there is such a decree, the convening authority must abide by it.

Alternately, assuming that the presence of a state decree does not rule out the convening authority's imposition of support conditions in acting on a court-martial, the command must shoulder a heavy burden in explaining why a need exists to intrude on a matter reserved to the states where the divorce court has special expertise, can oversee discovery which is necessary to framing a proper decree, and can take into account the parties' entire financial picture.

Petitioner respectfully submits that it offends public policy of the highest order when a convening authority—a federal official—with no "express grant of authority for such action" undertakes to rule on domestic relations matters which are committed to the states for decision, and as here, have actually been decided by a state court of competent jurisdiction. For this reason, Petitioner sub-

mits that the Supreme Court should grant the petition for a writ of certiorari to resolve the important question presented in this case concerning the relationship between local state courts and the military judicial system.

D. Denial of Due Process

The third reason the Supreme Court should grant the petition for a writ of certiorari in the present case is because Petitioner has been denied due process in his court-martial and in the appellate review of his case. The sloppiness in opinion writing, the lack of attention to detail in conducting courts-martial, and the failure to follow the laws and regulations governing military matters Petitioner contends is inexcusable.

Civilian control of the military is one of the fundamental principles upon which the American Government is based. Like the President of the United States who is the Commander in Chief of the Armed Forces, and the United States Congress which has the power to declare war and which exercises control over the military budget, Article III judges have an important responsibility to insure that service members are accorded due process in military trials and that their constitutional rights are not violated in military court proceedings. The amount of control the federal judiciary exercises over the armed forces is not great. The power federal judges have, however, is important because it is they who "insur[e] that the military . . . act[s] within the area assigned to it by Congress and the Constitution [and it is they who] insure[too] that the military's own judicial system . . . remain[s] subject to ultimate civilian control on basic issues." W. DOUGLAS, THE RIGHT OF THE PEOPLE 181 (1958). In short, like the executive and legislative branches, the federal judiciary has a responsibility to exercise control over the military and it does so by insuring that the constitutional rights of American service men and women are protected in military trials.

The failure of the military to follow basic statutory requirements and regulations is illustrated not only by the failure of the military to comply with the seniority requirements of Article 25 of the Uniform Code of Military Justice, but also in the Command's decision to retry Petitioner for misconduct for which he was acquitted in state court. Army Regulation provides that "[a] person subject to the UCMJ who had been tried in a civilian court . . . ordinarily will not be tried by court-martial or punished under Article 15, UCMJ, for the same act over which the civilian court has exercised jurisdiction." *Legal Service: Military Justice,* AR 27-10, para. 4-2 (Jan. 25, 1990).

The lack of prosecutions by courts-martial for perjury in cases where civilian courts have exercised jurisdiction and acquitted military personnel is seen in the absence of reported cases in which such prosecutions have been pursued. It is one thing for the federal government to seek to punish such perjury when the state court is performing a federal function, as where the perjury occurs in a state naturalization proceeding pursuant to an act of Congress. *See Holmgren v. United States,* 217 U.S. 509, 518-17 (1910). It is another matter where the state court's sole function is to determine, as here, whether its own law has been violated. Compare *United States v. Facchini,* 874 F.2d 638, 641-43 (9th Cir. 1989) (en banc) (false statements to a state agency in connection with claims for state-funded unemployment compensation held not a violation of 18 U.S.C. § 1001), with *United States v. Herring,* 916 F.2d 1543, 1546-47 (11th Cir. 1990).

The closing and locking of the doors of the Army Court of Military Review courtroom prior to oral arguments in Petitioner's case and refusing to let Petitioner's friends and family members attend the courtroom once it was locked is inexplicable. The United States Court of Military Appeals excuses this strange behavior by stating that since there is "no requirement for oral argument at all," Petitioner was not harmed. Pet. at 18a. The Court also relies on *United States v. Lonetree,* 35 M.J. 396, 411-12 (CMA

1992), to justify the locking of the courtroom doors before argument. In *Lonetree*, the Court justified the Court of Military Review's closure order because classified information was being discussed. There is nothing classified, however, in Petitioner's case. Nor was there anything discussed warranting the refusal to permit members of Petitioner's family or others access to a judicial proceeding. The matter is of constitutional significance because of the Sixth Amendment right to a public trial and because of the broad review powers accorded the Courts of Military Review under Article 66 of the Uniform Code of Military Justice. Unexplained closed appellate hearings raise concerns about military due process and create perception problems for the military. *See* Art. 36(a), 10 U.S.C. § 836(a) (1988); *United States v. Ezell*, 6 M.J. 307 (CMA 1979); *Courtney v. Williams*, 1 M.J. 267 (CMA 1976).

When coupled with the Army Court of Military Review's claim to have reviewed a *Grafstefon* issue when no such issue was presented to the Court of Military Review, public confidence and the confidence of the young men and women serving in the armed forces in the fairness of the military justice system is weakened.

If the mistakes, sloppiness, and lack of attention to detail evident in Petitioner's court-martial and appeals are representative of the way criminal trials in the military are conducted, Article III judges should be greatly concerned about whether the constitutional rights of service members are being protected adequately in military trials. It is by the review of the Supreme Court of the United States and other Article III courts that civilian control over military trials is exercised. Greater review by this Court and other federal courts over decisions made by the United States Court of Military Appeals, the Military Courts of Review, and courts-martial will insure that the constitutional rights of service members are protected by the military justice system. Such review also will insure

that the federal judiciary, like the executive and legislative branches, is fulfilling its responsibility to exercise civilian review over the military.

CONCLUSION

Counsel for Petitioner respectfully requests that the Supreme Court of the United States grant the petition for a writ of certiorari in the present case because the court-martial which tried Petitioner was improperly constituted and lacked jurisdiction to try him, and because Petitioner was unlawfully tried in the military court system for conduct that he was tried and acquitted of committing in a state court. In addition, Petitioner contends that the Court should grant his petition for a writ of certiorari because of the problems of federalism raised by the failure of the convening authority to conform his action in Petitioner's case with the state decree on child support and alimony and because of the general denial of due process Petitioner experienced in the military justice system.

Respectfully submitted,

JAN HORBALY
5310 Renaissance Court
Burke, Virginia 22015
(703) 978-7909
Counsel for Petitioner

Date: January 28, 1994

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 67,806
ACMR 9003419

UNITED STATES,
Appellee,

v.

DAVID P. SCHNEIDER,
Major U.S. Army,
Appellant.

Argued June 2, 1993

Decided Sept. 30, 1993

For Appellant: *Eugene R. Fidell* (argued); *Colonel Malcolm H. Squires, Jr.* and *Captain Beth G. Pacella* (on brief); *David M. Lewis, Jr.*

For Appellee: *Captain Samuel J. Smith, Jr.* (argued); *Colonel Dayton M. Cramer, Lieutenant Joseph A. Russelburg* and *Captain Samuel J. Smith, Jr.* (on brief); *Captain Donna L. Barlett.*

Military Judge: R. D. Russell

OPINION OF THE COURT

RYAN, Judge:

A general court-martial sitting at Fort Leavenworth, Kansas, convicted the appellant, Major David P. Schneider, of attempted premeditated murder, conduct unbecoming

an officer by committing adultery, and conduct unbecoming an officer by committing perjury, in violation of Articles 80 and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 933, respectively. He now appeals the decision of the United States Army Court of Military Review affirming his conviction and the sentence, 34 MJ 639 (ACMR 1992). He argues that there was an insufficiency of the evidence to convict him of these specifications, and also that there were several procedural errors at trial. For the reasons discussed below, we affirm.

I.

In 1987, the appellant moved to California with his wife and two children, pursuant to his assignment to the Lawrence Livermore National Laboratory. At the Laboratory, he worked with a woman named Paula, and by April 1989, their relationship had become sexual.

In 1989, the appellant was assigned to attend the U.S. Army Command and General Staff College at Fort Leavenworth, Kansas, and moved with his family into government quarters there. In August 1989, he met with an insurance agent, and purchased an additional $150,000 in life insurance coverage on his wife. He was the beneficiary of this policy, which had an effective date of October 1, 1989. That same summer, the appellant sold the former family home in California and used the proceeds to purchase a home in Tracey, California; he convinced his wife that her name should not be on the title. He then spent Labor Day weekend with Paula in California.

The incident out of which the specification of attempted murder arose occurred on October 20, 1989. That night, the appellant's wife awoke with intense pain in her head, and was pulled to a sitting position in her bed. She saw the appellant, visibly shaken, standing next to the bed. The toilet tank lid from the bathroom lay broken on the floor near his feet. She felt a baseball-sized lump on her head, which was "oozing." She brushed small pieces of

porcelain from her hair. The appellant told his wife, repeatedly, "You must have hit your head." He then assisted her to the bathroom, and she sat on the toilet. When she began shaking, he helped her to the bathroom floor and covered her with a quilt. Although the appellant suggested taking her to a doctor, his wife wanted only to go back to bed. The next morning, he took her to the medical facility, and there told medical personnel that Debbie was sleepwalking, picked up the toilet tank lid, tripped, and hit her head. Other evidence at trial, however, indicated that his wife had never walked in her sleep.

Two weeks later, on November 4, the appellant and his wife were to attend the Armor Ball. The appellant made arrangements for a "romantic" night at Embassy Suites Hotel. At the appellant's insistence, he and his wife left prior to the end of the ball in order to go to the hotel. Upon arriving, the appellant learned that although he had asked for an eighth-floor room when making reservations, he was given a room on the seventh floor.

They nonetheless took the elevator to the eighth floor, where they were observed by two sixteen-year-old girls. The girls saw the appellant and his wife walk side by side down the hallway. One girl then saw the appellant make vigorous hand movements in front of his wife as she faced him with her back to a rail overlooking an interior courtyard. The girl observed the appellant put his left arm around his wife at the point where the rail met her back, put his right hand on her chest, and flip her over the rail. The wife fell some seventy or eighty feet, and hit a table on the atrium floor. The girl watched the appellant look over the railing, walk toward the elevator, walk back to the railing, and then call for someone to call an ambulance. He then walked back to the elevator and proceeded down. When he reached the atrium floor, the appellant was cool and collected. His wife's pelvis was fractured in thirteen places; both left and right femurs

were broken in several places; a bone penetrated her abdominal cavity, damaging her colon; and an ankle and rib were fractured.

On December 4, one month after the ball and two days after his wife returned home from the hosiptal, the appellant told his wife that he didn't love her anymore and was getting a divorce. On December 5, he admitted to police that he had had an affair with Paula, and that he loved her and hoped to marry her when his divorce was final.

The appellant was charged by state authorities with first degree assault for the incident at the Embassy Suites Hotel. At the state trial, the appellant testified that the incident at the Embassy Suites Hotel occurred when he attempted to carry his wife across the threshold. He testified that he picked her up and was carrying her at high port when she told him that they were on the wrong floor. He then turned and tripped; his wife slipped from his grasp, causing her to fall over the balcony railing to the atrium floor. He testified that he did not intend to injure his wife. He was acquitted.

Shortly after the state case was concluded, military authorities charged the appellant with specifications of attempted premeditated murder, conduct unbecoming an officer by committing adultery, and conduct unbecoming an officer by committing perjury. A court consisting of officer members found the appellant guilty and sentenced him to dishonorable discharge, confinement for twenty-three years, and total forfeitures. The convening authority approved the sentence, except that he suspended the forfeiture in excess of $400 per month until execution of the discharge, provided that the suspended forfeitures be paid to the appellant's now ex-wife.

The conviction and sentence were affirmed by the Court of Military Review, a decision which the appellant now appeals.

II.

A.

We first consider the appellant's argument that "[t]he Court of Military Review erred in approving the findings because they were not supported by proof beyond a reasonable doubt and, in the case of the adultery charge, did not constitute an offense as a matter of law." As to the first aspect of the contention, the appellant invokes the wrong standard of review. Regarding matters of fact, we do not decide whether the Court of Military Review correctly applied *its* standard of review. Art. 66(c). We review under *our* standard of review for legal sufficiency of evidence. Art. 67(c), UCMJ; *Jackson v. Virginia,* 443 U.S. 307 (1979); *United States v. Harper,* 22 MJ 157, 161 (CMA 1986). As to the second aspect of the appellant's contention, adultery alleged as conduct unbecoming an officer (Art. 133, UCMJ) states an offense. *United States v. Johanns,* 20 MJ 155, 161 (CMA 1985).

Construing this assignment of error as a challenge to the legal sufficiency of evidence as to the findings, we are satisfied that the prosecution presented sufficient evidence as to each specification for a rational factfinder to find the appellant's guilt beyond a reasonable doubt. Specifically, with regard to the attempted murder charge, we look to the victim's testimony that she was awakened in the middle of the night with an enormous pain in her head, and a baseball-size lump on her head that was oozing fluid (R. 299-30); that the bathroom toilet tank lid lay on the bedroom floor near the appellant (R. 302, 320-21); and that bits of porcelain were in her hair and on her pillow. Medical testimony corroborated that the victim sustained head injuries, and the damaged toilet tank lid was introduced as a prosecution exhibit. In addition, we note that the factfinder could consider that the appellant had only a few weeks earlier taken out a large term life insurance policy on the victim, and that he had

recently induced the victim to sell their California house and to permit the purchase of another house in California in his name alone. This evidence and more, and the inference reasonably derivable therefrom, was sufficient as a matter of law to sustain the conviction for attempted murder.

Regarding the specification for conduct unbecoming an officer by committing adultery, both the appellant and Paula testified in the prior state court prosecution that they had been having an affair. (R. 230, 232, 393, 405.) The appellant's state trial testimony was received as an admission, and the parties stipulated to Paula's testimony. (R. 227.) The appellant's contention is that the evidence of adultery is insufficient because he never explicitly admitted to having sexual intercourse with Paula, only a "two and a half—three month affair." (P.E. 2 at 278). Paula admitted, however, the relationship "became a sexual relationship" approximately 5 months before the first attempt on the victim's life. (R. 230.) In addition to the state court testimony, several of the trysts were corroborated by documentary evidence and admissions to third parties. Suffice it to say, there is enough evidence to sustain the conclusion of the factfinder.

Finally, as to the conduct-unbecoming specification for the appellant's alleged perjury in connection with the state prosecution, there was abundant evidence adduced at the court-martial to overcome a sufficiency of evidence challenge. At the court-martial, the prosecution evidence amounted to a recapitulation of the evidence adduced at the state trial in connection with the incident at Embassy Suites. Witnesses testified to having seen the appellant push his wife off the balcony. Other witnesses observed the appellant after the fall and noted that his demeanor was markedly inconsistent with a concern for the victim's life. The witnesses' observations of the appellant's actions contrasted dramatically with the appellant's own account. In effect, the military prosecutors reproved the first de-

gree assault at the hotel; then they proved the content of the appellant's testimony as it varied from the prosecution's evidence. The resulting conclusion of the court-martial was that the appellant lied under oath at the prior hearing, and this conclusion was supported by sufficient evidence.

We hold, in sum, that the evidence was legally sufficient to sustain all of the charges and specifications.

B.

The next assignment of error we consider is the appellant's contention that his prosecution for conduct unbecoming an officer and a gentleman ("by wrongfully testifying under lawful oath before a jury sitting in the Platte County, Missouri, District Court") "was an abuse of discretion and violated his double jeopardy rights."

The appellant complains that in prosecuting him for falsely testifying, the military is merely attempting to do indirectly what it cannot do directly. We disagree. Plainly, the Fifth Amendment would have permitted the military to reprosecute the appellant directly for first degree assault or an equivalent offense under the Uniform Code of Military Justice. The double jeopardy clause does not bar one sovereign from proceeding on a charge of which an accused has been acquitted by another sovereign. *United States v. Wheeler,* 435 U.S. 313 (1978); *Bartkus v. Illinois,* 359 U.S. 121 (1959); *see Heath v. Alabama,* 474 U.S. 82 (1985). Furthermore, the doctrine of collateral estoppel is inapplicable to prosecutions by a separate sovereign. *United States v. Cuellar,* 27 MJ 50, 54-55 (CMA 1988). Since the appellant could have been reprosecuted by the military for first degree assault or its equivalent, he clearly could be prosecuted for the entirely separate offense of conduct unbecoming an officer, which was committed at a wholly distinct place and time.

The appellant's subordinate contention that his prosecution for falsely testifying was barred by Army policy also fails. Para. 4-2, Army Regulation 27-10, "Military Justice," provides the general rule:

> A person subject to the UCMJ who has been tried in a civilian court may, but *ordinarily* will not be tried by court-martial or punished under Article 15, UCMJ, for the same act over which the civilian court has exercised jurisdiction.

Paragraph 4-3 of the same regulation provides, however, that

> an officer exercising GCM jurisdiction may authorize disposition of a case under the UCMJ and the MCM *despite a previous trial.*

(Emphasis added.) The general court-martial convening authority here personally authorized the appellant's trial on the falsely-testifying specification, after making the requisite findings. And, as already pointed out, the appellant was not, in any event, prosecuted for "the same act" for which he was tried by the State of Missouri. Thus, the military was in full compliance with its policy. There was no bar to the appellant's prosecution for falsely testifying at his civilian trial, and the issue is without merit.

C.

We next turn to the appellant's claim that he was denied a fair trial and due process of law. He contends that the joinder of the false testimony specification with the attempted murder charge prejudiced him, because the false testimony charge in effect introduced evidence of another attempted murder, *i.e.*, his pushing the victim off the eighth story balcony. He contends that this joinder was impermissible because it introduced evidence of an offense of which he was acquitted and because the evidence of that alleged act "spilled over" to the attempted murder charge. In both respects, we disagree.

First, an acquittal of an offense does not bar reintroduction of the same evidence as uncharged misconduct in a subsequent prosecution. *Dowling v. United States*, —— U.S. ——, 110 S. Ct. 668 (1990).

Second, in accordance with the military judge's specific ruling, it appears that each of these acts would have been independently admissible as proof of the other, in order "to prove motive, intent and perhaps modus operandi." Mil. R. Evid. 404(b); *see United States v. Curry*, 31 MJ 359 (CMA 1990). Both the military judge and the Court of Military Review ruled that the probative value of the hotel incident outweighed any danger of unfair prejudice as to the toilet tank incident, 34 MJ at 644, and we are satisfied that both courts were within their discretion in so concluding. The appellant cannot be prejudiced by spillover if the evidence would have been received anyway. Moreover, the military judge gave a limited-use instruction as to the evidence of other acts. (R. 465-66, 716.)

The appellant also contends that the judge abused his discretion, under Mil. R. Evid. 403, in receiving "uncharged misconduct" evidence. Brief at 33. The thrust of this argument pertains more appropriately to the misjoinder contention, which we have decided adversely to the appellant. Conduct unbecoming an officer by falsely testifying was *charged*; thus evidence essential to proving the elements of the offense was not evidence of "uncharged misconduct."

The appellant next complains that the "sequential prosecution defeated the sequestration of witnesses." Brief at 35. In essence, he contends that, between the civilian trial and the court-martial, witnesses could have talked amongst themselves and worked out their story. The appellant cites no authority for the astounding proposition that witnesses must be sequestered in perpetuity, or else they may never again be called to testify again on a similar matter. We reject this proposition outright.

Finally, the appellant complains that the military judge improperly received the state court testimony of Paula, who, by the time of his court-martial, had vanished without a trace. We, however, are aware of no infirmity in the former-testimony exception to the hearsay rule, which the military judge applied correctly. Mil. R. Evid. 804 (b)(1); *see Ohio v. Roberts*, 448 U.S. 204 (1972).

In sum, we reject all aspects of this assignment of error.

D.

We next consider the appellant's contention that the military judge erred in failing to grant a mistrial after learning that the appellant's date of rank preceded that of one of the court members. Article 25(a), UCMJ, 10 U.S.C. § 825(a), provides as follows:

> Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

Article 25(d)(1), UCMJ, 10 U.S.C. § 825(d)(1), further provides:

> When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

The essential facts surrounding this issue are not in dispute. The junior member of the court-martial panel was Major Margaret Horrell. Her Officer Record Brief (ORB) erroneously indicated a date of rank earlier than the appellant's. The ORB dates were used by the Government to limit the potential court member pool to members senior to the appellant. Due to the erroneous ORB, Major Horrell was included in the member pool and ultimately selected for the court-martial. Prior to the trial, however, each prospective member was required to fill out a questionnaire. Among the information requested

was the member's date of rank. Major Horrell responded correctly, indicating a date of rank junior to the appellant's. Both the questionnaires and the ORBs were made available to the parties before trial. (R. 739-58.)

Reportedly, defense counsel first noticed the discrepancy while the court members were deliberating on findings, after all evidence on the merits had been presented. The defense did not bring the matter to the military judge's attention at that time, however. Later that day, findings were duly returned—still without comment from the defense—and the court-martial recessed for the evening. It was not until the next morning that defense counsel brought the matter to the military judge's attention. Needless to say, Major Horrell's correct date of rank was promptly ascertained. The military judge was not pleased with the defense's delay in making its implied challenge to the jurisdiction of the court-martial and to the findings. The judge ruled that the defense had waived objection, implicitly holding that the defect was not jurisdictional. However, the judge granted a challenge of Major Horrell prospectively for sentencing. The Court of Military Review agreed with the trial judge's ruling.

Historically, the seniority requirement was established to "remove[] any temptation on the part of the members to convict the accused and thus perhaps create an opportunity for personal promotion." F. Gilligan and F. Lederer, *Court-Martial Procedure* § 15-24.00 (1991); *see also* W. Winthrop, *Military Law and Precedents* 72 (1920 reprint); 17 Op. Att'y Gen. 397-98 (1882). Although it is apparent that Major Horrell was "junior . . . in rank or grade" to the appellant within the meaning of Article 25, nevertheless, a glance at Article 25(a) is all that is necessary to know that the defect that occurred here was not jurisdictional. That subsection makes clear that "[a]ny commissioned officer on active duty is eligible

to serve on all courts-martial . . . ." *See United States v. McGee*, 15 MJ 1004, 1006 (NMCMR 1983).

We agree with the lower courts that the defense was dilatory in not bringing the discrepancy to the trial judge's attention sooner. We need not resolve whether such inaction amounted to waiver or forfeiture, for we detect no possibility that the appellant was prejudiced by Major Horrell's participation on findings. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a). Assuming the concerns historically underlying Article 25 retain validity, Major Horrell had no reason to know when she participated in jury deliberations that she was junior to the appellant until after the defense brought the matter to the judge's attention. Thus, personal advantage could not have been a motivation in deciding to convict. This issue is without merit, and the appellant is entitled to no relief.

E.

The appellant contends that the convening authority abused his discretion in two respects. The appellant argues that the convening authority exceeded his authority in crafting the conditional suspension of forfeitures for the benefit of the appellant's ex-wife and children. Although the court-martial sentenced the appellant to *inter alia*, total forfeitures, the convening authority suspended so much of the forfeitures of the appellant's pay and allowances as exceeded $400 per month, *on the condition that* the appellant "continuously claim on an Internal Revenue Service Form W-4, so long as he may legitimately do so, that he is single with two dependents, and that he initiate and maintain a monthly military pay allotmen to be paid directly to . . . [the victim] in the amount of $2500.00." (Action of convening authority.)

The final decree of divorce between the appellant and the victim provided that the monetary award for support and maintenance was considerably less than the suspended forfeitures flowing to the victim as a result of

the convening authority's action. By letter, counsel for the appellant requested the convening authority to conform the amount of suspended forfeitures flowing to the victim to the amount awarded in the divorce proceedings, and to permit the appellant to receive a sufficient portion of his pay to satisfy an outstanding debt. (Attachment to defense final brief.) The convening authority declined to modify his action. The appellant now contends that the convening authority had "a duty to conform the conditional partial suspension of the sentence to the levels provided in the state court decree," and he accuses the convening authority of interfering with a matter "reserved" to the state court. We reject these contentions.

The sentence handed down by a court-martial is independent of any civil judgment. The appellant's right is to an appropriate sentence, no more and no less. It was entirely permissible, of course, for the appellant to request the convening authority to reduce his forfeiture. By the same token, the convening authority was within his discretion in denying this reduction.

Pay and allowances forfeited as a result of a court-martial sentence revert to the United States. *See* para. 70511(a)(5), DOD 7000.14, Military Pay and Allowances Entitlements Manual (Jan. 1, 1993); *see also* Discussion, RCM 1003, Manual for Courts-Martial, United States, 1984. Thus, neither the appellant nor anyone else, save the United States, has standing to contest the appropriateness of the disposition of forfeitures. We have recently upheld the convening authority's inherent power to make a suspension of forfeitures contingent upon an accused's initiating and maintaining an allotment for the benefit of the service member's minor children. *United States v. Cowan*, 34 MJ 258 (CMA 1992). Even if it should somehow be authoritatively determined that the continuing disposition of forfeitures to the victim here is inappropriate, the appellant does not stand to benefit. This aspect of the appellant's argument is without merit.

The appellant next contends that the convening authority abused his discretion in declining to defer execution of the appellant's sentence to confinement. At the conclusion of the court-martial, the appellant requested that the convening authority defer his sentence to confinement during the appellate process. Document not found in allied papers of the court record, but attached to the appellant's Supplement to Petition for Grant of Review, App. 12 (letter dated 17 Nov 90.)) The convening authority denied the request,

> base[d] . . . upon the seriousness of the offenses of which the accused stands convicted, the amount of confinement imposed by the court-martial and the attendant risk of flight, and the adverse effect which such deferment would have on good order and discipline in the command.

(1st endorsement to letter dated 17 Nov 90, *supra.*) The appellant reiterated his request for deferment of confinement several months later, in a post-trial submission pursuant to RCM 1105 ("Posttrial Objections and Submission [etc.]" at 20, dated Feb. 4, 1991, allied papers). The convening authority, in his action, again rejected the request.

In 1969, Article 57(d), UCMJ, 10 U.S.C. § 857(d), was modified to provide:

> On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority . . . may in his sole discretion defer service of the sentence to confinement.

This court has held that the convening authority's discretion was reviewable. *United States v. Brownd,* 6 MJ 338 (CMA 1979); *see United States v. Sloan,* 35 MJ 4, 12-13 (CMA 1992). We have also made clear that it was imposing a burden on the convening authority to articulate "reasons . . . sufficient as a matter of law to

demonstrate that he did not abuse his discretion in denying petitioner's deferment request[.]" *Trotman v. Haebel*, 12 MJ 27 (CMA 1981).

The appellant denounces the convening authority's explanation here as "entirely conclusory, . . . [that] in important respects do[es] not withstand scrutiny." (Final Brief at 43.) In view of the instant circumstances, it is unnecessary for us to reconsider the accuracy of our prior holdings. We are satisfied that, conclusory though they may be, on this record the convening authority's explanation was sufficient.

A convening authority's decision on deferment of confinement is not separable from its context. The context includes the subject matter of the request: the court-martial that has just occurred. When a convening authority cites the seriousness of offense and its impact on the community, it is thus appropriate to take into consideration the evidence marshaled at trial.

We note the brutality of the murder attempt of which the appellant stands convicted. We also note evidence of the appellant's lack of personal integrity, including his mendacity and extravagance in connection with his trysts with his paramour (R. 231, 293); his manipulation and deceit in duping the victim out of her interest in the martial real estate; his purchase of a substantial term insurance policy on the victim's life shortly before he attempted to dispatch her; and his efforts to make the murder attempt look like an accident. (R. 253-54; 297.) These and other matters of record simply justified the convening authority's misgivings about the likelihood of the appellant remaining available for confinement at the conclusion of the appellate process.

The appellant has not met his burden of persuading us that the convening authority abused his discretion in denying the deferment request. *See United States v. Brownd*, *supra*; RCM 1101(c)(3). The issue is without merit.

F.

We finally consider the appellant's contention that the decision of the Army Court of Military Review, affirming his conviction, is invalid because he was denied a right to a public hearing before that court. This issue relates to the conduct of the hearing before the Court of Military Review. Our information about what occurred is derived from various affidavits filed in this Court. In broad terms, there is general agreement about what transpired.

A few days before oral argument in the Court of Military Review was scheduled, the Chief of the Army's Defense Appellate Division, Colonel Robert Kirby, approached the U.S. Army Legal Services Agency (USALSA) Executive, Colonel Joseph Neurauter, and his assistant, Major Paul Snyders. Colonel Kirby advised these officers that an unusually large number of spectators was anticipated at the appellant's hearing, and that there could be press interest. The next day, the Senior Judge of the panel assigned to hear the appellant's case, Colonel Anthony De Giulio, also approached the USALSA Executive with concerns about crowd management for the hearing.

Colonel Neurauter and Major Snyders decided to provide as many chairs as practicable in the courtroom. The trade-off was that no one would be allowed to enter or exit once the arguments began because the additional chairs would so restrict movement in the small courtroom that spectators arriving or leaving would disrupt the arguments. In addition, the officers decided to ask Senior Judge De Giulio to commence the hearing about five minutes late to allow late-comers to be seated. Finally, military spectators would be asked to yield their seats to civilian spectators to permit the maximum number of civilians to attend. Both Senior Judge De Giulio and Colonel Kirby were briefed about the proposed procedures; Colonel Kirby, however, has no recollection of being notified about the courtroom closure aspect.

On the day of the oral arguments, the appellant's family and a number of family friends were seated in the courtroom. Major Snyders positioned himself at the courtroom door. As the arguments commenced, Snyders noticed that approximately twenty people were seated in the courtroom, occupying approximately three-fourths of the available seating. At that point, Snyders realized that the precautions that had been taken were unnecessary. However, because the proceedings were already underway, with Senior Judge De Giulio in control of the courtroom, Major Snyders felt that he had no authority unilaterally to modify the plan. Therefore, he adhered to the predetermined policy and instructed the guard to deny further access to the courtroom. Some of the appellant's family friends and some lawyers not assigned to the case, approximately ten in all, arrived after the hearings had commenced and were denied access.

An irreconcilable dispute exists as to the precise time the hearings actually commenced. Major Snyders insists that, in accordance with the plan, the hearings commenced approximately five minutes after the officially appointed time. Furthermore he asserts in his affidavit that he remained at the door for five minutes thereafter and that no additional spectators had arrived as of the time of his departure. Numerous parties affiliated with the Schneider family, however, and several counsel assigned to the Defense Appellate Division, insist that the hearings actually commenced before the officially appointed time. Several would-be spectators, moreover, alleged that they were present at the courtroom door prior to the scheduled starting time, but were denied access because the hearings were already in session.

Article 66(a), UCMJ, 10 U.S.C. § 866(a), requires the respective Judge Advocates General to "establish a Court of Military Review." However, nothing in Article 66 or elsewhere mandates that the Courts of Military Review conduct oral arguments in each of the cases re-

viewed. *United States v. Stinson*, 34 MJ 303, 306 (CMA 1992); *United States v. August*, 21 MJ 363, 364 (CMA 1986); *United States v. Rodriguez-Army*, 19 MJ 177 (CMA 1985); *see* Rule 16, Courts of Military Review Rules of Practice and Procedure, 22 MJ CXXXIII (1985); *cf. United States v. Lonetree*, 35 MJ 396, 411 (CMA 1992) (hearing closed to all without proper security clearances in case involving classified matters). Indeed, it appears that in a significant percentage of cases the Court of Military Review decide cases without benefit of oral argument.

There being no requirement for oral argument at all, the decision of the Court of Military Review in the appellant's case can hardly be fatally flawed by the fact that some potential spectators were denied access because a well-intentioned plan did not work out as projected.

In retrospect, numerous steps might have been, but were not, taken to avoid the problem that occurred. The fact remains that a hearing was conducted that was attended by the appellant's family and some members of the public, but that, notwithstanding the best of intentions, some people were excluded. These circumstances, in our opinion, do not constitute a denial of a public hearing, even if one was required. No error occurred to the material prejudice of a substantial right of the appellant. Art. 59(a), UCMJ. This assignment of error is without merit.

III.

The decision of the United States Army Court of Military Review is affirmed.

Judges COX, CRAWFORD, MAYER, and SPORKIN CONCUR.

APPENDIX B

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 9003419

UNITED STATES,
Appellee,

v.

MAJOR DAVID P. SCHNEIDER,
083-38-5785, United States Army,
Appellant.

31 Jan. 1992.

For Appellant: David M. Lewis, Jr. (argued), Captain Holly K. Desmarais, JAGC (on brief).

For Appellee: Captain Samuel J. Smith, Jr., JAGC (argued), Colonel Dayton M. Cramer, JAGC, Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Major Kenneth T. Grant, JAGC (on brief).

Before De GIULIO, HAESSIG and ARKOW, Appellate Military Judges.

OPINION OF THE COURT

De GIULIO, Senior Judge:

Appellant was tried by general court-martial for attempted murder of his wife and two specifications of conduct unbecoming an officer and a gentleman by committing perjury and by having sexual intercourse with and otherwise engaging in a sexual or other improper affair with a woman not his wife in violation of Articles 80 and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 933 (1982) [hereinafter UCMJ]. Contrary to his pleas, a court consisting of officer members found him

guilty and sentenced him to dismissal, confinement for twenty-three years, and total forfeitures. The convening authority approved the sentence except that he conditionally suspended the forfeiture in excess of $400.00 pay per month until execution of the dismissal.[1]

Appellant asserts several errors which we find to be without merit. We affirm the findings of guilty and the sentence.

This is a case where the offenses were motivated by love and money. In 1987, appellant was assigned to the Lawrence Livermore National Laboratory in California. He moved to the area with his wife and two children. While working at the laboratory, he met Paula, with whom he worked for a time on a daily basis. In August 1987, Paula's friends asked Paula, the appellant, and appellant's family to accompany them on a boat trip. Appellant indicated that his wife and children would not go because his wife feared for the safety of the children but, if permitted, he would go. During the boat trip which lasted overnight, appellant and Paula shared adjoining quarters at the opposite end of the boat from where the other passengers were quartered. In April of 1989, according to Paula, her relationship with appellant became sexual and intimate.[2]

In July 1989, appellant told his wife that he had to go on a mission for the laboratory; but, due to its classified nature, he could not tell her of its location, other details, or point of contact for emergencies. In fact, appellant and Paula traveled to Hawaii where they stayed together in the King Kamehameha Hotel, Kailua, Hawaii.

---

[1] The suspended forfeiture is the subject of an assignment of error and will be discussed in this opinion.

[2] Paula did not testify at the court-martial because she could not be found. Her prior testimony at appellant's state criminal trial was admitted into evidence. It is evident from that testimony that she was reluctant to testify and had refused to talk to prosecutors before she testified.

In 1989, appellant was assigned to attend the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas. At Fort Leavenworth, he moved his family into government quarters. In August 1989, he met with an insurance agent. Although the agent recommended appellant increase insurance coverage on himself, appellant declined to do so but stated he wanted an additional $150,000 coverage on his wife, Debbie. This policy, with appellant as the beneficiary, was effective 1 October 1989.

In the fall of 1989, appellant purchased a home in Tracey, California. He convinced Debbie that her name should not be on the title. He used the proceeds from the sale of the family home near his prior assignment for the purchase of this house. He told her that he had to go to California to take care of details of this purchase over Labor Day weekend of 1989. He spent that weekend with Paula. Paula told a friend that it was the best weekend of her life.

Numerous telephone calls were made between appellant at Fort Leavenworth and Paula in California.

After returning home from a party on the evening of 20 October 1989, Debbie went to bed and fell asleep. She awoke with intense pain in her head and was pulled up to a sitting position on the bed. She saw appellant standing next to the bed. The toilet tank lid from the bathroom was on the floor near his feet. The toilet tank lid was broken. She felt a baseball-sized lump on her head. The lump was "oozing." She brushed small pieces of porcelain from her hair. She described appellant, who was normally calm and cool in time of crisis, as visibly shaken. He stated repeatedly, "you must have hit your head." Appellant assisted her to the bathroom where she sat on the toilet. When she began shaking, he helped her to the bathroom floor and covered her with a quilt. He wanted to take her for medical attention but she wanted only to go back to bed. He assisted her

to the bed. The next morning, he took her to the medical facility. When asked what had happened to her head, appellant stated to medical personnel that Debbie was sleepwalking, picked up the toilet tank lid, tripped, and hit her head. The statement that she was injured while sleepwalking was recorded on medical documents. Evidence of record indicates appellant's wife had never walked in her sleep. When she returned home, Debbie found small pieces of the toilet tank lid on her pillow. This incident was the subject of the specification alleging attempted murder.

On 28 October 1989, appellant took his wife for a "romantic" overnight stay in a local downtown hotel. The room was on the top floor. After dinner he tried to get her to drink more champagne than she normally consumed. After they went to their room, appellant tried to get her out on the balcony. She refused because it was too cold and because she was afraid of heights.

On 4 November 1989, appellant and his wife were to attend the Armor Ball. Without her knowledge, appellant made arrangements for another "romantic" night at Embassy Suites Hotel. She discovered his plans when the babysitter told him she could not stay overnight. Appellant decided to go to the hotel after the ball anyway but to return home early. At the ball Debbie enjoyed the dancing and only left early to go to the hotel at appellant's insistence. Although appellant had asked for an eighth floor room when making reservations, he was given a room on the seventh floor.

Two sixteen-year-old girls, Chantel and Brandi, who were on the eighth floor, observed appellant and his wife when they entered the hotel. They were attracted to the couple because of their "extravagant attire." They watched appellant and his wife ride the glass elevator to the eighth floor and watched them walk side by side down the hallway. Brandi looked away. Chantel saw appellant make vigorous hand movements in front of his wife as she faced him with her back to the rail. She observed

appellant put his left arm around Debbie where the rail met her back, put his right hand on her chest, and flip her over the rail. Chantel watched Debbie plunge 70-80 feet and hit a table on the atrium floor.[3] Chantel watched appellant look over the railing, walk toward the elevator, walk back to the railing and call for someone to call an ambulance. He then walked back to the elevator and proceeded down. Testimony indicates that appellant's conduct when he reached the atrium floor can be described as cool and collected. Debbie's pelvis was fractured in thirteen places. Both left and right femurs were broken in several places, with one bone penetrating her abdominal cavity, damaging her colon. She also had a fractured ankle and a fractured rib. Her colon injury required a temporary colostomy. While his wife was being wheeled into the operating room, he asked the doctor to give her a "tummy tuck." Debbie's roommate at the hospital and the roommate's mother described appellant's attitude toward his wife while she was hospitalized as cool and distant. He was also described as a "jerk" in his attitude toward his wife.

On 2 December 1989, Debbie returned home from the hospital confined to a wheelchair. On 4 December, appellant told her that he didn't love her anymore and was getting a divorce. On 5 December, in an interview with local police, appellant admitted having an affair with Paula, stated he loved her and hoped to marry her when his divorce was final. On 6 December, appellant filed for divorce. Later, appellant was charged by local authorities with first degree assault for the incident at the Embassy Suites Hotel on 4 November. On 18 December, appellant moved to have his petition for divorce dismissed.

At his trial for attempted murder in state court, appellant testified that, at the Embassy Suites Hotel, they mis-

---

[3] Debbie has no memory of this event from the time she entered the hotel.

takenly went to the eighth floor.[4] He told his wife that he wanted to carry her across the threshold. He picked her up and was carrying her at high port when she told him they were in the wrong place. He turned and in doing so tripped. His wife slipped from his grasp, causing her to fall over the balcony railing to the atrium floor.[5] He testified that he did not intend to injure his wife. Appellant was acquitted of this offense in the state court.

At the state trial, appellant also testified regarding the October toilet tank lid incident. He stated that his wife went to bed, and he stayed up to do his school homework. Before he went to bed, he noted the toilet was running. He removed the tank lid and set it down against the cabinet. He fixed the toilet but decided to leave the tank lid off. He then went to bed and to sleep. He was awakened by a motion on the bed or noise. His wife was sitting on the bed, moaning, with her hand to her head. He got up to go to her but stepped on something. When he turned on the light, he discovered it to be "shards of obviously pieces of the toilet tank lid." She complained her head hurt, but upon his inquiry stated she didn't know what had happened. He stated that it was clear to him that she had hurt herself somehow. He helped her to the bathroom where she started to go into shock. He sat her on the toilet and turned on the faucet in the tub, in case he needed water. He then wrapped her in a blanket and checked to see if she could discern the number of fingers he held before her. He wanted to take her to the hospital but she refused. He concluded she did not have a fracture, gave her aspirin, and took her to bed. He testified at his state trial that he told personnel

---

[4] Appellant did not testify at his court-martial. His testimony at his trial in civilian court was properly admitted into evidence.

[5] It is this part of his testimony which is the subject of the perjury allegation as conduct unbecoming an officer in this court-martial.

at the hospital that, "She was probably sleepwalking. I don't know or words to that effect." He testified, "I don't believe I would have told them she was sleepwalking, cause Debbie has never sleptwalked, and so I wouldn't say that."

I.

Appellant alleges that the military judge erred in denying a mistrial based on an officer junior in rank to appellant having participated in deliberations on findings.

Appellant's date of rank is 1 April 1989. The Officer Record Brief (ORB) of one of the court members, Major H, incorrectly reflects her date of rank to be 1 March 1989. In a response to a questionnaire provided all court members, Major H indicated that her date of rank was 1 March 1990. Both the ORB and the responses to the questionnaire had been provided appellant's counsel prior to voir dire. Apellant's counsel discovered the discrepancy while the court was deliberating on findings. They elected not to raise the issue, however, until after the findings were announced. Indicating that he believed the matter was intentionally not brought to his attention until after findings unfavorable to appellant were announced, the military judge denied the motion for a mistrial, based upon waiver. He did, after confirming the member was junior to appellant, grant a challenge for cause to the member's further participation during the sentencing phase of the trial.

That a member of the court is junior in grade or rank to the accused is a ground for challenge or removal for cause. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 912(f)(1)(K) [hereinafter R.C.M.].[6] The challenge should be made after voir dire

[6] Article 25(d)(1), UCMJ, 10 U.S.C. § 825(d)(1), provides, "When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade."

or at any other time during trial when it becomes apparent that a ground for challenge may exist. R.C.M. 912(f)(2)(A) and (B). It is not a jurisdictional defect where a member of a court-martial is junior in rank or grade to an accused. *United States v. McGee*, 15 M.J. 1004 (N.M.C.R.1983). Failure to challenge for cause or object where a court-member is junior to an accused waives the defect R.C.M. 912(f)(4); *United States v. Wilson*, 21 M.J. 193 (C.M.A.1986); *McGee*, 15 MJ at 1006.

In the case before us, we find that the defense was provided the documents containing the information which was the basis for a challenge for cause. Due diligence would have disclosed that information. Indeed, members of the defense team discovered the evidence while the court was deliberating on findings and made the decision not to object until after findings were announced. Under these circumstances, we hold appellant waived any objection to the court member who was junior in rank or grade to him.[7] The military judge properly denied the motion for a mistrial.

II.

Appellant contends that the military judge erred in denying a motion to sever the offenses of attempted murder and perjury. He contends that it is unlikely that appellant would have been found guilty of attempted murder had the perjury offense not been joined. He contends the spillover effect of the Embassy Suites Hotel incident had a tendency to influence the members unduly for the attempted murder offense. He further argues that without the perjury specification, the prejudicial effect outweighs the probative value of the evidence. We disagree with this argument.

---

[7] We need not determine if the waiver also applied to the sentencing procedure because the military judge granted a challenge by defense to Major H's further participation in the case.

As a general rule in military practice, all known offenses are tried at a single trial. *See* R.C.M. 601(e)(2) (all known charges should be referred to a single court-martial). *See also* R.C.M. 906(b)(10) discussion ("Ordinarily, all known charges should be tried at a single court-martial"). It is true, however, that specifications may be severed to prevent a manifest injustice. R.C.M. 906(f)(10). Depending upon the facts presented in a case, a spillover of the evidence may make it impossible for a rational fact finder to separate the evidence of one specification from the other. *United States v. Haye,* 29 M.J. 213, 214 (C.M.A. 1989). The test to be applied is whether the evidence presented as to one would be independently admissible to prove the other. *Id.* at 215. Further, a limiting instruction may prevent prejudice. *United States v. Hogan,* 20 M.J. 71, 73 (C.M.A.1985).[8]

In the case *sub judice,* the 4 November incident involving the evidence on the perjury specification was admissible under Mil.R.Evid. 404(b) as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The military judge gave the court a limiting instruction on the use of the evidence of the 4 November incident. We hold therefore that there was no "spillover effect" of the evidence. We find, as did the military judge, that the probative value of the evidence is not substantially out-weighed by the danger of unfair prejudice. *See* Mil.R.Evid. 403. The military judge properly denied the motion to sever the offenses.

III.

Next, appellant contends that the military judge erred by denying a motion to dismiss the specification of perjury because it violated appellant's right against double jeopardy. Appellant's argument is that his testimony in his state court trial went to the heart of the issue of the

---

[8] In both *Hogan* and *Haye* offenses involving the questioned evidence were dismissed. This is not the case before us.

offense for which he was tried and was determined favorable to him. Thus, he argues, the government is collaterally estopped from charging appellant with perjury for his testimony. We do not agree with appellant that double jeopardy applies here.

The doctrine of collateral estoppel has not been applied in military criminal law. *United States v. Cuellar*, 27 M.J. 50 (C.M.A.1988), *cert. denied*, 493 U.S. 811, 110 S.Ct. 54, 107 L.Ed.2d 23 (1989). We see no reason to apply it here. Additionally, prosecution of an offense in state court does not normally bar a federal prosecution of the same criminal matter. *Heath v. Alabama*, 474 U.S. 82, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985); *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *United States v. Lanza*, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314 (1922). We find no merit in this assertion of error.

IV.

Appellant also asserts that the evidence is legally insufficient to support the finding of guilty of attempted murder and factually insufficient to support the findings of guilty of all offenses. The test for legal sufficiency is whether a reasonable fact finder, viewing the evidence in a light most favorable to the government, could have found all the essential elements of the charged offense. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Applying this test, we find the evidence legally sufficient to support the finding of guilty of attempted murder. Although not challenged by appellant, we also find the evidence legally sufficient to support the findings of guilty to the two offenses of conduct unbecoming an officer and a gentleman.

The test for factual sufficiency of the evidence is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of appellant's guilt of the offenses. *See* UCMJ art. 66(c),

10 U.S.C. § 866(c); *United States v. Turner*, 25 M.J. 324 (C.M.A.1987). Applying this test, we are convinced beyond a reasonable doubt of appellant's guilt of all of the offenses.

V.

Finally, appellant alleges that the convening authority's action imposed illegal and unenforceable conditions on the suspension of forfeitures. Appellant was sentenced, *inter alia*, to forfeiture of all pay and allowances. In his post-trial submissions to the convening authority, appellant requested assistance in supporting his dependents. The convening authority's action provided in pertinent part:

> However, the execution of that part of the sentence extending to forfeiture of all pay and allowances in excess of $400.00 per month is suspended until the execution of that part of the sentence extending to a dismissal from the service, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action, this suspension being on the conditions that the accused continuously claim on an Internal Revenue Service Form W-4, so long as he may legitimately do so, that he is single with two dependents, and that he initiate and maintain a monthly military pay allotment to be paid directly to Deborah A. Schneider in the amount of $2500.00. The remainder of the sentence, except for that part of the sentence extending to a dismissal from the service, will be executed.

Subsequently, in a divorce decree, a state court ordered an amount less than that provided by the convening authority's action be paid for support and maintenance for Debbie and appellant's children. Appellant then requested the convening authority either eliminate the terms of suspension or revise them to conform to the state court requirements. The convening authority denied appellant's request.

Appellant maintains that the convening authority ignored the determination of a court of competent jurisdiction regarding the appropriate level of family support and maintenance where both parties were represented by counsel. Appellant reasons that he "by no stretch of reasoning, agreed to pay an amount in excess of that which was ultimately judged fair and reasonable by such court" and that "the terms of the suspension represent an overreaching. . . ." [9]

This Court has held a convening authority can impose a suspension of forfeitures contingent upon initiating and maintaining an allotment for support and may name a recipient for the allotment.[10] *United States v. Cowan*, 32 M.J. 1041 (A.C.M.R.1991). The convening authority's action is based upon federal statute, and his action in approving a court-martial sentence is within his sole discretion. *See* UCMJ art. 60(c), 10 U.S.C. § 860(c). It is separate from and can be taken without regard to a state court civil action. We hold the convening authority can properly approve a suspended forfeiture, the conditions of which are more stringent than the support and maintenance requirements of a state court. The allegation of error is without merit.

We have examined the assertions of error personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A.1982) and find them also to be without merit.

The findings of guilty and the sentence are affirmed.

Judge HAESSIG and Judge ARKOW concur.

---

[9] Except in cases involving pretrial agreements, an accused's agreement to a sentence has little play in the convening authority's determination of the sentence to be approved in his action. Seldom does an accused agree to his approved sentence.

[10] Although we continue to believe this is unwise, a convening authority is not precluded from such action. *See United States v. Cowan*, 32 MJ. at 1042, n. 1.

APPENDIX C

IN THE DISTRICT COURT
OF LEAVENWORTH COUNTY, KANSAS
FIRST JUDICIAL DISTRICT

Case No. 90DR303

IN THE MATTER OF THE MARRIAGE OF:
DEBORAH A. SCHNEIDER,
Petitioner

and

DAVID POWERS SCHNEIDER,
Respondent

JOURNAL ENTRY OF DIVORCE

[Filed Mar. 12, 1991]

NOW, on the 7th day of February, 1991, the above entitled divorce came regularly on for hearing. The Petitioner Wife appeared in person and by and through her attorney, George M. Wolf. The Respondent Husband appeared by and through his attorney, Michael F. Willcott. There were no other appearances.

WHEREUPON, the Petitioner Wife called witnesses to the stand, elicited testimony and rested her case. The Respondent Husband called witnesses to the stand, presented testimony and exhibits and rested his case.

THE COURT after hearing the evidence, arguments of counsel, reviewing the case file and being otherwise well and fully advised in the premises, finds as follows:

1) That the Petitioner Wife has been a resident of Fort Leavenworth, a military installation, adjacent to and

adjoining the County of Leavenworth, State of Kansas for more than sixty (60) days prior to the filing of her Petition for Divorce.

2) That the Petitioner Wife and Respondent Husband were married on June 11, 1977 at West Point, New York and are now and have been since that time husband and wife.

3) Two (2) minor children were born of this union, namely, Lauren Ann Schneider, born May 28, 1981; and Jason Robert Schneider, born August 23, 1984.

4) That the parties are incompatible with each other and that the Respondent Husband has failed to perform a material marital duty to and toward the wife.

5) That as a result of the Respondent Husband's failure to perform a material marital duty as developed in the evidence, the Court is justified in making an unequal distribution of property and an increased award of child support and maintenance.

6) The Petitioner Wife herein should be awarded the sole custody of the party's two minor children, subject to the contacts or visitation for Respondent Husband as set forth in Dr. Lohrenz's recommendations in his reports filed herein.

7) That the Respondent Husband should be ordered to pay child support on a percentage basis as well as ordered to pay maintenance on a percentage basis.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the above entitled findings should be, and the same hereby are, incorporated into and made a Judgement, Order and Decree of this Court.

IT IS THEREFORE FURTHER ORDERED BY THE COURT that the parties are hereby divorced, each from the other on the grounds of incompatibility and the

Respondent Husband's failure to perform a material marital duty, and that the bonds of matrimony heretofore existing between the Petitioner Wife and Respondent Husband should be, and they hereby are, dissolved, set aside and held for naught.

IT IS FURTHER ORDERED BY THE COURT that the Petitioner Wife shall be awarded the sole custody of the two (2) minor children of the parties subject to Respondent Husband's contacts and visitation as set forth in the reports dated July 26, 1990 and January 14, 1991 by Dr. Leander J. Lohrenz, which reports are incorporated herein and made a part and order of this Court as though more fully set out herein.

IT IS FURTHER ORDERED BY THE COURT that the Respondent Husband shall be ordered to pay as and for child support the sum and amount of forty percent (40%) of the Respondent Husband's income to the Clerk of the Leavenworth County District Court and that said child support shall take effect on the first day of March, 1991 and be due and payable on the first day of each month thereafter until such time as the children reach the age of majority or until the further order of this Court.

IT IS FURTHER ORDERED BY THE COURT that the Respondent Husband shall pay to the Petitioner as and for maintenance the sum and amount of twenty-five (25%) of the Respondent Husband's income and that same shall be paid through the Clerk of the Leavenworth County District Court, payable on the first day of March, 1991 payable on the first day of each month thereafter for a period of one hundred twenty (120) months. That said maintenance shall terminate upon the death of the Petitioner Wife, remarriage of the Petitioner's Wife, cohabitation of Petitioner Wife (which is defined as actually residing with an adult, non relative male in a marriage like relationship for substantial consecutive periods of time in excess of thirty (30) days) or the expiration of

one hundred twenty (120) months, whichever of the above shall happen first.

IT IS FURTHER ORDERED BY THE COURT that the Respondent Husband shall maintain the life insurance that he presently has in effect and shall name the two (2) minor children as the primary beneficiaries of same. Respondent Husband should forthwith make arrangements with all insurance carriers involved to direct copies of all delinquent or lapsed notices to Petitioner Wife so that she can pay the premiums to keep said life insurance in full force and effect. In the event that the Respondent Husband fails to make the payments for said insurance, and the wife advances the payments for same, then said advanced payments shall become a child support judgement on behalf of the Petitioner Wife and against the Respondent Husband.

IT IS FURTHER ORDERED BY THE COURT that the Petitioner herein shall receive the two (2) minor children as her tax exemptions.

IT IS FURTHER ORDERED BY THE COURT that the Respondent Husband shall receive as his sole and separate property, free from any right, title claim or interest of the Petitioner Wife the following items, to-wit:

(a) Antique Grandfather .45 caliber pistol, holster and accessories;

(b) Antique Grandmother's Sapphire Ring;

(c) All of his books associated with his schooling, education, and military aspects;

(d) His personal clothing, jewelry and effects.

IT IS FURTHER ORDERED BY THE COURT that by the agreement of the parties as developed in the evidence and as part of their duty to support their minor children, that the following property shall be set aside and placed forthwith into an Irrevocable Spendthrift

Trust created for the future welfare and educational purposes of the minor children of the parties. That said Spendthrift Trust upon its drafting shall be submitted to the undersigned District Court for its approval and acceptance as to its terms and conditions. The items of property to be included in said Spendthrift Trust are the following:

(a) Any and all interest in the real estate owned in the State of California, which legal description is as follows:

375 Edgewood Drive, Tracy, California:

Lot 43, shown upon that certain map entitled "Tract Number 2163, Quail Meadows, Unit Number I, in the City of Tracy, filed for Record of the Recorder of the County of San Joaquin, State of California, on December 15, 1988, Volume 29 of maps, at page 50."

(b) 1988 VW Fox automobile;

(c) 1969 Venture Sailboat 6hp motor and trailer;

(d) Two (2) Moro oil paintings;

(e) Four (4) Hummel figure collection;

(f) Man's 10-speed bicycle;

(g) Service for 12 sterling silverware;

(h) Crystal set, consisting of 12 water glasses; 12 wine glasses; 12 champagne glasses;

(i) The Petitioner's diamond engagement ring;

(j) Any and all checking, savings, or certificates of deposits with the names of either or both of the minor children on them.

That both the Petitioner Wife and Respondent Husband are hereby ordered upon the acceptance and appointment of a Trustee for the Spendthrift Trust, to take all steps necessary to assure that the above listed items are assigned over immediately into said Trust and said

parties shall execute any and all documents necessary to effect such transfer to the designated Trustee. If this transfer is not done by the parties within ten (10) days of the Spendthrift Trust being approved by the Court then the Court reserves the right to reconsider this issue and make another division of this property as the Court considers warranted in the circumstances.

IT IS FURTHER ORDERED BY THE COURT that all remaining property listed in the papers and pleadings filed herein and not specifically set over above is hereby awarded to the Petitioner Wife as her sole and separate property free and clear of any right, title or interest of the Respondent Husband.

IT IS FURTHER ORDERED BY THE COURT that each party shall be responsible for any and all debts which they have created in their own names since the separation of the parties in December, 1989.

IT IS FURTHER ORDERED BY THE COURT that each party shall be responsible for his or her own costs associated with the preparation of each party's case.

IT IS FURTHER ORDERED BY THE COURT that the Petitioner Wife and Respondent Husband shall each pay one-half of the costs and expenses incurred by the parties as a result of Dr. Leander J. Lohrenz's preparation of his reports, and his time and testimony in Court.

IT IS FURTHER ORDERED BY THE COURT that each party is responsible for his or her own attorney fees.

IT IS FURTHER ORDERED BY THE COURT that the Petitioner Wife and Respondent Husband exchange with each other copies of each year's Federal and State Income Tax Returns during the minority of said children or until further order of the Court.

IT IS FURTHER ORDERED BY THE COURT that the California Trusts designated as Wm. Hervey and Brown Hervey Trust Agreements are Spendthrift Trusts in which

the Respondent Husband is a beneficiary; that said Trusts antedated the marriage of the parties and are not marital property and the Respondent Husband's interests in said Trusts are set over to him.

THIS DECREE shall become effective upon the filing of the instant Journal Entry of Divorce this 12th day of March, 1991.

/s/ [Illegible]
District Judge

GEORGE M. WOLF
FIELD, GENTRY & BENJAMIN, P.C.
12 Corporate Woods, Suite 12
10975 Benson
Overland Park, Kansas 66210
Attorney for Petitioner Wife

MICHAEL F. WILLCOTT
419 Shawnee Street
Leavenworth, Kansas 66048
Attorney for Respondent Husband

APPENDIX D

ACTION

DEPARTMENT OF THE ARMY
HEADQUARTERS
U.S. ARMY COMBINED ARMS COMMAND
AND FORT LEAVENWORTH (PROVISIONAL)
Fort Leavenworth, Kansas 66027-5000

15 February 1991

In the general court-martial case of MAJ David P. Schneider, 083-38-5785, United States Army, Headquarters Company, United States Army Combined Arms Command and Fort Leavenworth (Provisional), Fort Leavenworth, Kansas 66027-7160, the sentence is approved. However, the execution of that part of the sentence extending to forfeiture of all pay and allowances in excess of $400.00 per month is suspended until the execution of that part of the sentence extending to a dismissal from the service, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action, this suspension being on the conditions that the accused continuously claim on an Internal Revenue Service Form W-4, so long as he may legitimately do so, that he is single with two dependents, and that he initiate and maintain a monthly military pay allotment to be paid directly to Deborah A. Schneider in the amount of $2500.00. The remainder of the sentence, except for that part of the sentence extending to a dismissal from the service, will be executed.

/s/ L. P. Wishart
LEONARD P. WISHART III
Lieutenant General, USA
Commanding

Accused's R.C.M. 1105 and 1106 submissions as listed on SJA Recommendations were considered prior to action.

FILED
MAY - 2 1994
OFFICE OF THE CLERK

No. 93-1230

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVID SCHNEIDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DAYTON M. CRAMER
Colonel, JAGC, USA

JAMES L. POHL
Major, JAGC, USA

JAMES P. CALVE
Major, JAGC, USA

JOHN P. SAUNDERS
Captain, JAGC, USA

SAMUEL J. SMITH, JR.
Captain, JAGC, USA

Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, Va. 22041-5013

QUESTIONS PRESENTED

1. Whether petitioner's court-martial lacked jurisdiction because an officer, junior in rank to petitioner, participated as a court member.

2. Whether the Double Jeopardy Clause barred the federal government from proceeding against petitioner after his acquittal in state court on charges arising out of the same misconduct.

3. Whether the discretionary suspension of a portion of petitioner's sentence by the general court-martial convening authority is superseded by a civil court's divorce decree.

4. Whether petitioner was denied due process in his court-martial or on appellate review.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Abbate v. *United States*, 359 U.S. 187 (1959)	9
Ashe v. *Swenson*, 397 U.S. 436 (1970)	10
Bartkus v. *Illinois*, 359 U.S. 121 (1959)	9
Heath v. *Alabama*, 474 U.S. 82 (1985)	9
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980)	13
United States v. *Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984)	9
United States v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980)	9
United States v. *Caceres*, 440 U.S. 741 (1979)	12
United States v. *Cowan*, 34 M.J. 258 (C.M.A. 1992)	10
United States v. *Jordan*, 870 F.2d 1310 (7th Cir.), cert. denied, 493 U.S. 831 (1989)	9
United States v. *Lanza*, 260 U.S. 377 (1922)	9
United States v. *McGee*, 15 M.J. 1004 (N.-M.C.M.R. 1983)	8
United States v. *Olano*, 113 S. Ct. 1770 (1993)	8
United States v. *Patterson*, 809 F.2d 244 (5th Cir. 1987)	12
United States v. *Payner*, 447 U.S. 727 (1980)	12
United States v. *Rodriguez-Amy*, 19 M.J. 177 (C.M.A. 1985)	13
United States v. *Stinson*, 34 M.J. 303 (C.M.A. 1992)	13
United States v. *Warren*, 13 M.J. 278 (C.M.A. 1982)	10

Cases—Continued: Page

Waller v. *Georgia*, 467 U.S. 39 (1984) 12

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. V (Double Jeopardy Clause) 6, 8, 10
Amend. VI 12
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 25(a), 10 U.S.C. 825(a) 8
Art. 25(d)(1), 10 U.S.C. 825(d)(1) 8
Art. 66, 10 U.S.C. 866 12
Art. 80, 10 U.S.C. 880 2
Art. 133, 10 U.S.C. 933 2
Art. 142(f), 10 U.S.C. 942(f) 7
Army Reg. 27-10, *Legal Services: Military Justice* (Dec. 22, 1989) 11
para. 4-2 11
para. 4-3 11
Rules for Courts-Martial:
R. 912(b) 8
Analysis 8
R. 912(f)(4) 8

Miscellaneous:

Francis A. Gilligan & Frederic I. Lederer, 1 *Court-Martial Procedure* (1991) 8
Manual for Courts-Martial, United States—1984 8

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1230

DAVID SCHNEIDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, Pet. App. 1a-18a,[1] is reported at 38 M.J. 387. The opinion of the United States Army Court of Military Review, Pet. App. 19a-30a, is reported at 34 M.J. 639.

---

[1] Pet. App. 1a-18a is not a completely accurate reproduction of the opinion of the Court of Military Appeals. The opinion reproduced at Pet. App. 1a-18a is missing all footnotes, and it contains omissions from, and additions to, the text. Our citations to the opinion of the Court of Military Appeals will accordingly be to the opinion as it appears in the Military Justice Reporter.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1993. The petition for a writ of certiorari was filed on January 28, 1994, following an order by Chief Justice Rehnquist, entered November 23, 1993, extending the time to file the petition to and including January 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Following a general court-martial at Fort Leavenworth, Kansas, petitioner was convicted of attempted murder and conduct unbecoming an officer, in violation of Uniform Code of Military Justice (UCMJ) Articles 80 and 133, 10 U.S.C. 880 and 933. Pet. App. 19a. Petitioner was sentenced to confinement for 23 years, dismissal from the service, and total forfeiture of pay and allowances. *Id.* at 20a, 29a. The convening authority[2] approved the findings and sentence, except with respect to the adjudged total forfeiture of pay and allowances. *Ibid.* In response to a clemency request, the convening authority partially suspended forfeitures in excess of $400 per month "on the condition that [petitioner] * * * initiate and maintain a monthly military pay allotment to be paid directly to Deborah A. Schneider in the amount of $2500.00." *Id.* at 29a. The Army Court of Military Review affirmed the findings and sentence. *Id.* at 19a-30a. The Court of Military Appeals granted discre-

---

[2] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members (who are analogous to jurors), directs that the accused be tried by the court-martial for the charged offenses, and conducts a post-trial review of the proceedings.

tionary review and affirmed. *United States* v. *Schneider*, 38 M.J. 387 (C.M.A. 1993).

1. a. In 1987, petitioner and his family moved to California, where he worked at the Lawrence Livermore National Laboratory. There, petitioner met Ms. Paula Blake, a co-worker. Petitioner and Ms. Blake admitted that their relationship became sexual by April 1989. 38 M.J. at 389.

In 1989, petitioner moved to Fort Leavenworth, Kansas, to attend the U.S. Army Command and General Staff College. In August 1989, he purchased an additional $150,000 in life insurance coverage on his wife. He was the beneficiary of the policy, which was effective on October 1, 1989. Petitioner sold the family home in California and used the proceeds to buy another home in Tracy, California. He convinced his wife that her name should not be on the deed. 38 M.J. at 389. Over the Labor Day weekend, he travelled to California ostensibly to purchase the new home. Tr. 297. He spent the weekend with Ms. Blake, who described it as "the best weekend of her life." Tr. 245; 38 M.J. at 389.

b. On the evening of October 20, 1989, petitioner's wife awoke with intense pain in her head and felt herself being pulled to a sitting position on the bed. Petitioner was standing next to the bed. He appeared visibly shaken. The toilet tank lid from the bathroom lay broken on the floor near his feet. His wife felt an oozing, baseball-sized lump on her head and brushed pieces of porcelain from her hair. 38 M.J. at 389.

Petitioner helped his wife to the bathroom. When she began to shake, he helped her to the floor, covered her with a quilt, and said repeatedly "[y]ou must have hit your head." 38 M.J. at 389. Petitioner suggested medical treatment, but his wife wanted only to return to bed. The next morning, he took her to the hospital. He told

medical personnel that his wife was sleepwalking, picked up the toilet tank lid, tripped, and hit her head. Evidence at trial indicated that petitioner's wife never walked in her sleep. *Ibid.*

c. Two weeks later, petitioner and his wife attended the Armor Ball at Fort Leavenworth. Petitioner arranged a "romantic" night at an Embassy Suites Hotel. 38 M.J. at 389. At his insistence, petitioner and his wife left the ball early to go to the hotel. When they arrived, petitioner learned that he had received a room on the seventh floor despite his request for a room on the top floor. Nonetheless, they took an elevator to the top floor. Two teenage girls observed petitioner and his wife walk side by side down the hallway. One girl saw petitioner make vigorous hand movements in front of his wife as she faced him with her back to a rail overlooking an interior courtyard. The girl watched petitioner put his left arm around his wife at the point where the rail met her back, put his right hand on her chest, and flip her over the rail. Petitioner's wife fell over 70 feet onto a table on the atrium floor. *Id.* at 389-390.

Both girls saw petitioner look over the railing, ask "for someone to call an ambulance," walk to the elevator, and walk back to the railing. 38 M.J. at 390. Then, petitioner walked back to the elevator and proceeded to the atrium floor, where he appeared cool and collected. *Ibid.*; Tr. 417-418, 438, 456.

Petitioner's wife survived, but her pelvis was fractured in 13 places. Femurs in both legs were broken in several places. A bone penetrated her abdomen, damaging her colon. One ankle and several ribs were

fractured.[3] Two days after his wife returned from the hospital, petitioner told her that he did not love her and that he was getting a divorce. The next day, he admitted to police that he loved Ms. Blake and hoped to marry her when his divorce was final. 38 M.J. at 390. The following day he filed for a divorce. Tr. 316, 400.

2. Petitioner was charged by Missouri state authorities with first-degree assault for the incident at the hotel. At the state trial, he claimed that he picked his wife up and was carrying her at "high port" when she told him that they were on the wrong floor. He turned and tripped, causing his wife to slip from his grasp and fall over the balcony railing. He testified that he did not intend to injure his wife. 38 M.J. at 390.

Petitioner also testified about the toilet tank lid incident. He stated that he went to bed about one hour after his wife that evening. He repaired the toilet before going to bed but left the top off of the toilet tank. He was awakened by his wife, who was sitting on the edge of the bed with her feet on the floor and holding her head and moaning. He discovered the toilet tank lid on the floor as he walked around the bed to help her. Petitioner was acquitted. 38 M.J. at 389 n.2, 390.

3. Shortly thereafter, military authorities charged petitioner with attempted premeditated murder arising out of the toilet tank lid incident, conduct unbecoming an officer by committing adultery, and conduct unbecoming an officer by committing perjury in the Missouri proceeding. 38 M.J. at 390. At trial, petitioner moved to dismiss the charge of conduct unbecoming an officer based on perjury as a violation of the doctrines of

---

[3] At the hospital, as his wife was taken to the operating room, petitioner asked the doctor if he could give his wife a "tummy tuck," a cosmetic surgery procedure. Tr. 401.

collateral estoppel and double jeopardy. Tr. 28; AX I. The military judge denied the motion on the ground that the court-martial charge was a different offense that was prosecuted by a different sovereign. Tr. 81. Petitioner was found guilty of all charges. 38 M.J. at 390.

On the next day, petitioner moved for a mistrial, contending that his court-martial lacked jurisdiction because a court member was junior to him in date of rank. That court member, Major Margaret Horrell, had been selected for the court martial panel on the basis of military records that erroneously indicated that she was senior to petitioner in date of rank. Before trial, Major Horrell filled out a questionnaire that correctly indicated her date of rank, and that questionnaire was made available to petitioner's counsel before trial. Petitioner's counsel, however, reportedly did not notice the discrepancy until the court martial panel was deliberating, and he then waited until after adverse findings were returned before raising any issue as to Major Horrell's ability to participate in the deliberations. The military judge found that petitioner waived any error arising from Major Horrell's junior status, but he granted a challenge of her prospectively for sentencing. 38 M.J. at 393-394.

4. The Army Court of Military Review affirmed. Pet. App. 19a-30a. First, the court rejected petitioner's claim that the perjury charge was barred by the Double Jeopardy Clause, explaining the doctrine of collateral estoppel has not been applied in military criminal law and that, in any event, "prosecution of an offense in state court does not normally bar a federal prosecution of the same criminal matter." *Id.* at 27a-28a. Second, the court agreed with the military judge that petitioner waived any objection to the junior court member's participation. Third, the court rejected the contention that the con-

vening authority's conditional suspension of sentence infringed rights established by petitioner's civil court divorce decree. *Id.* at 29a-30a. Fourth, the court found that the evidence was legally and factually sufficient to support the findings of guilty on all charges. *Id.* at 28a-29a.

5. A unanimous Court of Military Appeals affirmed.[4] 38 M.J. 387. The court found that the evidence was legally sufficient to support the findings. *Id.* at 390-391. The court also held that the petitioner's prosecution for conduct unbecoming an officer—based on his perjury at the Missouri trial—did not violate petitioner's double jeopardy rights, because the two prosecutions were undertaken by different sovereigns. *Id.* at 391-392. Next, the court determined that the defect of a junior court member's participating in petitioner's court-martial was not jurisdictional and that petitioner was "dilatory in not bringing the discrepancy to the judge's attention sooner." *Id.* at 394. The court concluded that petitioner suffered no prejudice from the junior officer's participation, because the purpose of the rule is to remove any temptation on the part of the junior officer to convict the accused in order to create an opportunity for personal promotion, and here, the junior officer was unaware of petitioner's seniority when she participated in deliberations. *Ibid.* Finally, the court rejected petitioner's claim that the convening authority erred in conditioning suspension of his forfeitures on petitioner's agreement

---

[4] Judge James L. Ryan of the United States Court of Appeals for the Sixth Circuit, Judge H. Robert Mayer of the United States Court of Appeals for the Federal Circuit, and Judge Stanley Sporkin of the United States District Court for the District of Columbia sat by designation pursuant to Article 142(f), UCMJ, 10 U.S.C. 942(f). Chief Judge Sullivan and Judges Gierke and Wiss did not participate in petitioner's case. See 38 M.J. at 397.

to make certain payments to his former wife. The court explained that petitioner's divorce decree, to the extent it contemplated that petitioner would have less stringent financial obligations to his former wife, was not binding on the convening authority, since "[t]he sentence handed down by a court-martial is independent of any civil judgment." *Id.* at 394-395.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the military judge erred in denying his motion for a mistrial because an officer junior to him in rank participated in deliberations on findings. The courts below correctly found that any defect was not jurisdictional. Article 25(a), UCMJ, 10 U.S.C. 825(a), states that, "[a]ny commissioned officer on active duty is eligible to serve on all courts-martial." The preference in Article 25(d)(1), UCMJ, 10 U.S.C. 825(d)(1), for court members who are senior in rank to an accused is not jurisdictional and can be waived. Rules for Courts-Martial (R.C.M.) 912(f)(4); Analysis, R.C.M. 912(b), *Manual for Courts-Martial, United States—1984*, at A21-A54; see also Francis A. Gilligan & Frederic I. Lederer, 1 *Court-Martial Procedure*, § 15-24.00, at 564 (1991). The Army Court therefore correctly found that petitioner waived any objection to the junior officer's participation in his court-martial. Pet. App. 25a-26a. See *United States* v. *McGee*, 15 M.J. 1004 (N.-M.C.M.R. 1983). Cf. *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993). That fact-bound conclusion warrants no further review.

2. Petitioner contends (Pet. 11-18) that because the perjury charge in this case was based on the same conduct of which he was acquitted in state court, it was barred by the Double Jeopardy Clause. That Clause, however, does not bar successive prosecutions by two

different sovereigns. See, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985); *Abbate* v. *United States*, 359 U.S. 187, 193-194 (1959). Under the "dual sovereignty" doctrine, when a defendant violates the "peace and dignity" of two sovereigns by breaking the laws of each, he commits two distinct "offenses." *Abbate* v. *United States*, 359 U.S. at 193-194; *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). As the Court recently reiterated:

> [A]n offence, in its legal signification, means the transgression of a law. Consequently, when the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.

Heath v. *Alabama*, 474 U.S. at 88 (internal quotation marks omitted). That principle answers petitioner's claim here.

Contrary to petitioner's suggestion (Pet. 3), a different result is not warranted by the fact that military authorities cooperated with Missouri in the prosecution of the state offense. As this Court has recognized, that type of cooperation between state and federal governments "is the conventional practice," and it does not result in the application of double jeopardy principles to the second sovereign. *Bartkus* v. *Illinois*, 359 U.S. 121, 123 (1959). See also *United States* v. *Jordan*, 870 F.2d 1310, 1313 (7th Cir.), cert. denied, 493 U.S. 831 (1989); *United States* v. *Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984); *United States* v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

Petitioner's invocation (Pet. 15) of the doctrine of collateral estoppel is similarly mistaken. To the extent it applies in criminal cases, the doctrine of collateral

estoppel derives from the Double Jeopardy Clause. See *Ashe* v. *Swenson*, 397 U.S. 436, 445-446 (1970). Thus, petitioner's claim that the military was estopped by the state acquittal fails for the same reason as his broader double jeopardy claim—*i.e.*, the federal government is not bound by the actions of the State of Missouri. Cf. *United States* v. *Warren*, 13 M.J. 278, 281 (C.M.A. 1982) (collateral estoppel doctrine may bar a prosecution of a defendant who has been acquitted in a case brought by the *same* sovereign). Even if the military could be estopped by Missouri's conduct, however, collateral estoppel would not apply here because the military prosecution for perjury raises issues not resolved in the state court proceeding. The state-court jurors may have disbelieved petitioner's testimony in key respects yet found the evidence insufficient to prove the charged offense beyond a reasonable doubt.

3. Petitioner contends (Pet. 18-21) that the convening authority's conditional suspension of a portion of the adjudged forfeitures violates "elementary principles of federalism," Pet. 18, because the condition requires petitioner to pay his former wife a larger sum than that ordered by the divorce decree entered by a state court. The Court of Military Appeals has correctly concluded that the convening authority has broad authority and discretion to impose conditions to the suspension of a sentence. *United States* v. *Cowan*, 34 M.J. 258, 259-260 (C.M.A. 1992) (discussing interaction of relevant provisions of the Uniform Code of Military Justice). There was no abuse of discretion in the suspension conditions imposed here.

The lawful judgment of the court-martial was that petitioner forfeit his pay and allowances to the United States. The convening authority's decision to suspend the imposition of total forfeitures—on condition that

payments be made instead to petitioner's former wife—is an act of clemency that affects only the interest of the United States. Thus, the Court of Military Appeals correctly concluded that "neither [petitioner] nor anyone else, save the United States, has standing to contest the appropriateness of the disposition of forfeitures. * * * Even if it should somehow be authoritatively determined that the continuing disposition of forfeitures to the victim here is inappropriate, [petitioner] does not stand to benefit." 38 M.J. at 395. The principles of federalism on which petitioner relies do not detract from that conclusion. That petitioner may have acquired certain financial obligations as a result of a lawful divorce judgment does not give him the right to object to other obligations that he must assume as a condition of partial clemency by the United States.

4. Petitioner's final claim (Pet. 21-23) is that he was denied due process by the military's purported violation of its regulation prohibiting a court-martial following a civilian court trial, and by the military's closure of the courtroom in which his appeal to the Army Court of Military Review (Army Court) was heard. Neither due process contention has merit.

a. The Army did not, as petitioner contends, violate Army Regulation (AR) 27-10, *Legal Services: Military Justice* (Dec. 22, 1989), which concerns court-martial prosecutions of the same act over which a civilian court has previously exercised jurisdiction. That regulation does not prohibit all military prosecutions for the same act. See AR 27-10, para. 4-2. It merely requires that the general court-martial convening authority authorize such proceedings. See AR 27-10, para. 4-3. Such authorization was obtained in petitioner's case. 38 M.J. at 392. Moreover, petitioner's court-martial involved prosecution for a different act—conduct unbecoming an officer

for perjury. Therefore, the military was in full compliance with its policy. *Ibid.* Even assuming that the regulation was violated, the courts do not remedy violations of regulations and internal policies by setting aside the findings, as petitioner requested. *United States* v. *Payner*, 447 U.S. 727, 736 (1980); *United States* v. *Caceres*, 440 U.S. 741, 755 (1979); *United States* v. *Patterson*, 809 F.2d 244, 248 (5th Cir. 1987).

b. There is no greater merit to petitioner's claim that he was denied a public hearing before the Army Court. The facts relevant to that claim are largely undisputed. In anticipation of an unusually large number of spectators, personnel of the U.S. Army Legal Services Agency placed additional seating in the Army Court's hearing room. The additional seating restricted movement in the small courtroom so that spectators arriving or leaving would disrupt the proceedings. The presiding judge accordingly decided to begin the hearing about five minutes late to allow late-comers to be seated, and then to close the proceedings to avoid the disruptions that could result from the crowded conditions created by the additional seating. Some of petitioner's family friends, and some military lawyers not assigned to the case, arrived after the hearing commenced and were denied access even though some seats remained available. See 38 M.J. at 396-397.

Contrary to petitioner's suggestion (Pet. 23), no authority supports the claim that the Sixth Amendment's "public trial" requirement applies to the hearing of an appeal. Cf. *Waller* v. *Georgia*, 467 U.S. 39, 47 (1984) (public trial guarantee applies to hearing on suppression motion because, *inter alia*, "witnesses are sworn and testify" and "[t]he outcome frequently depends on a resolution of factual matters"). Article 66, UCMJ, 10 U.S.C. 866, does not require the Army Court to hear any

oral argument. 38 M.J. at 397; *United States* v. *Stinson*, 34 M.J. 303, 306 (C.M.A. 1992); *United States* v. *Rodriguez-Amy*, 19 M.J. 177 (C.M.A. 1985). It would be anomalous, in the absence of strong countervailing considerations, to conclude that appellate hearings before the Army Court must be open to the same extent as criminal jury trials.

In any event, even under this Court's cases requiring open-court proceedings in various contexts, the limited closure of the appellate courtroom here would be justified. "Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, * * * so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial. * * * It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 581-582 n.18 (1980). The restrictions that were placed on access to the appellate courtroom here fit well within that principle. Indeed, the procedures used by the Army Court—involving, as they did, the provision of additional seating—may well have allowed a larger attendance at the hearing of the appeal than otherwise would have been possible. The Court of Military Appeals therefore correctly concluded that those restrictions "do not constitute a denial of a public hearing, even if one was required." 38 M.J. at 397.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DAYTON M. CRAMER
Colonel, JAGC, USA

JAMES L. POHL
Major, JAGC, USA

JAMES P. CALVE
Major, JAGC, USA

JOHN P. SAUNDERS
Captain, JAGC, USA

SAMUEL J. SMITH, JR.
Captain, JAGC, USA

Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

MAY 1994

Supreme Court, U.S.
FILED
MAY 18 1994
OFFICE OF THE CLERK

(3)

No. 93-1230

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVID P. SCHNEIDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITIONER'S REPLY BRIEF

JAN HORBALY
5310 Renaissance Court
Burke, Virginia 22015
(703) 978-7909
Counsel for Petitioner

Date: May 18, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13 pp

QUESTIONS PRESENTED

I. Whether a service member's court-martial was improperly constituted and lacked jurisdiction to try him because an officer, junior in rank to the service member, participated as a juror in the service member's court-martial and voted on his guilt, and then prior to sentencing was dismissed as a juror when the trial judge learned that the officer (1) was junior in rank to the service member being tried, and (2) was serving as a juror on the court-martial in violation of Article 25(d)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 825(d)(1) (1988).

II. Whether a court-martial is collaterally estopped from retrying a service member for misconduct for which he was tried in a state court and acquitted.

III. Whether federalism precludes a general officer from overriding a decision of a state court in domestic matters.

IV. Whether the errors in the serviceman's court-martial and military appellate review amount to a denial of due process in violation of the Fifth Amendment of the Constitution.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
A. Misstatement of the Facts	1
B. Lack of Court-Martial Jurisdiction	2
C. Double Jeopardy	6
D. Civilian Review of the Military	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Abbate v. United States, 359 U.S. 187 (1959)	6
Heath v. Alabama, 474 U.S. 82 (1985)	6
McClaughry v. Deming, 186 U.S. 49 (1902)	4, 5
United States v. Cowan, 34 M.J. 258 (CMA 1992)	7
United States v. Estrella, 35 M.J. 836 (ACMR 1992)	8
United States v. Grostefon, 12 M.J. 431 (CMA 1982)	2
United States v. McGee, 15 M.J. 1004 (NMCMR 1983)	5
United States v. Newcomb, 5 CMR 4 (CMA 1978)	4
United States v. Schneider, 34 M.J. 639 (ACMR 1992)	2
United States v. Wright, 35 M.J. 899 (ACMR 1992)	8
Statutes	
Article 25(a), UCMJ, 10 U.S.C. § 825(a) (1988)	3
Article 25(d)(1), UCMJ, 10 U.S.C. § 825(d)(1) (1988)	3, 5
Rules	
Rule 912(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1230

DAVID P. SCHNEIDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITIONER'S REPLY BRIEF

INTRODUCTION

A. Misstatement of the Facts

The government's latest attempt to prevent petitioner, a man who continues to maintain his innocence of all charges against him,* from obtaining the kind of review of his case the Constitution mandates is unpersuasive. Indeed, this Court must not be swayed by the self-serving interpretation of irrelevant authorities by the same staff

---

* The government concedes that petitioner "was charged by Missouri state authorities with first-degree assault for the incident at the hotel," that during the Missouri trial petitioner testified about the "incident at the hotel" and "about the toilet tank lid incident," and that the Missouri jury found petitioner not guilty of the charges against him. (Brief in Opp. 5) In addition the government fails to note that petitioner passed a government polygraph examination concerning the "incident at the hotel" and "the toilet tank lid incident."

of military lawyers who have distorted the issues in this case since it first was presented to the Army Court of Military Review.

Unfortunately, those responsible for representing the government and deciding military cases have misstated facts and blatantly lied. In *United States v. Schneider*, 34 M.J. 639 (ACMR 1992), for example, the Army Court of Military Review states:

> We have examined the assertions of error personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (CMA 1982) . . .

Id. at 646. No such assertions of error exist because petitioner never submitted anything to the Court pursuant to *Grostefon*. It is this sort of sloppiness and lack of attention to detail that marks the manner in which the government and the military courts have treated this case.

Because the "facts" of a case are seldom still in dispute at this stage of the proceedings, one can only assume that the purpose of the government's 6-page long regurgitation of the facts is to divert attention from the legal arguments they prefer not to address. There are no fewer than 10 factual errors in the government's summary of the facts. The government's obsession with the facts is perhaps the clearest indication that it lacks confidence in the conviction. If the government succeeds in focusing the Court's attention on the facts as opposed to the significant legal issues presented in this case, then proper review of the issues and exercise of civilian control of the military will never occur.

B. Lack of Court-Martial Jurisdiction

In addition to misstating the facts, the government misstates the law under the Uniform Code of Military Justice and the Manual for Courts-Martial concerning the eligibility of officers to serve as members of courts-martial.

The government states that Article 25(a) of the Uniform Code of Military Justice provides that "[a]ny com-

missioned officer on active duty is eligible to serve on all courts-martial." Art. 25(a), UCMJ, 10 U.S.C. § 825(a) (1988). (Brief in Opp. 8) The government then argues that the "preference in Article 25(d)(1), UCMJ, 10 U.S.C. 825(d)(1), for court members who are senior in rank to an accused is not jurisdictional and can be waived." *Id.*

What the government fails to set forth is the specific language of Article 25(d)(1) of the Uniform Code of Military Justice which provides that "[w]hen it can be avoided, *no* member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." Art. 25(d)(1), UCMJ, 10 U.S.C. § 825(d)(1) (1988) (emphasis added).

A fair reading of Article 25 of the Uniform Code of Military Justice sets forth two requirements with respect to officers serving on courts-martial. The first requirement is that any commissioned officer on active duty is eligible to serve on courts-martial. The second requirement is that, when it can be avoided, no member of an armed force, that is an officer, warrant officer, or enlisted member, may be tried by a court-martial in which any court member—officer, warrant officer, or enlisted member—is junior in rank or grade to the member being tried.

Rule 912(f)(1) in the Manual for Courts-Martial, cited by the government (Brief in Opp. 8), sets forth the grounds for challenging court members. R.C.M. 912 (f)(1), MCM (1984). Rule 912(f)(1) provides that "[a court] member shall be excused for cause whenever it appears that the member: (A) Is not competent to serve as a member under Art. 25(a) . . ." R.C.M. 914 (f)(1) & (A), MCM (1984).

The Analysis of Rule 912(f)(1), also cited by the government (Brief in Opp. 8), states that "[*e*]*xcept for matters affecting the composition of the court-martial* (*see* Articles 16 and 25(a) . . .) improper selection of members is not a jurisdictional defect." Analysis, R.C.M.

912(b) at A21-54, MCM (1984) (emphasis added). The inference to be drawn from this statement is that matters affecting the composition of the court-martial, that is, the eligibility of officers to serve on courts-martial, are jurisdictional defects.

Counsel for Petitioner respectfully submits that Article 25 of the Uniform Code of Military Justice clearly provides that any commissioned officer on active duty is eligible to serve on a court-martial. If this is true, the only ground provided in Article 25 of the Uniform Code of Military Justice for challenging such an officer as ineligible or incompetent to sit as a court member is because he is junior in rank or grade to the member being tried by court-martial. Such a challenge goes to the competency of the officer to sit on the court-martial and is jurisdictional error according to the statement in the Analysis cited by the government. *See id.*

In addition, the United States Court of Military Appeals has never held that the failure of the government to comply with the seniority provision of Article 25(d)(1), UCMJ, 10 U.S.C. § 825(d)(1) is not jurisdictional error. *See United States v. Newcomb*, 5 CMR 4 (CMA 1978) (failure of commander to comply with provisions of the UCMJ in appointing parties to a court-martial rendered court-martial jurisdictionally defective).

The government contends that "petitioner waived any objection to the junior officer's participation in his court-marital" and that this "fact-bound conclusion warrants no further review." (Brief in Opp. 8) In *McClaughtry v. Deming*, 186 U.S. 49 (1902) (the presence of members who do not meet the requirements of the statute is jurisdictional error), the Supreme Court of the United States did not hold that the participation of Regular Officers on the accused's court-martial was waived by the accused and thus presented a "fact-bound conclusion warrant[ing] no further review;" instead the Supreme Court held that the presence of members who do not meet the requirements of the statute is jurisdictional error.

If the government is correct in contending that "petitioner waived any objection to the junior officer's participation in his court-martial" and that "any defect [in this regard is] not jurisdictional" (Brief in Opp. 8), why did the military judge dismiss the junior officer as a court member after findings and prohibit her from participating in adjudging the sentence in petitioner's case. (R. 739-58). In other words, if the "petitioner waived any objection to the junior officer's participation in his court-martial" as the government contends he did, and the error is "not jurisdictional," why was the junior member not permitted by the military judge to participate in adjudging a sentence too?

The reason the junior member was dismissed is because Article 25(d)(1) of the Uniform Code of Military Justice states that "[w]hen it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior in rank to him in rank or grade." In short, the junior member was dismissed by the military judge because she was serving on the court-martial in violation of Article 25(d)(1), UCMJ, 10 U.S.C. § 825 (d)(1) (1988). Absent a showing by the government that her service on the court-martial was necessary, her presence on the court-martial was jurisdictional error, and as long as she served on it, the court-martial was improperly constituted. *See McClaughry v. Deming*, 186 U.S. 49 (1902) (the presence of members who do not meet the requirements of the statute is jurisdictional error). *Contra United States v. McGee*, 15 M.J. 1004, 1005-06 (NMCMR 1983) (the presence of members who do not meet the requirement of the statute is *not* jurisdictional error).

The jurisdictional issue presented in this case is of great significance to over a million men and women serving in the armed forces of the United States. The military must follow the rules prescribed by Congress for conducting courts-martial. Congress enacted these rules to ensure that the constitutional and due process rights of young

men and women serving in the armed forces of the United States are protected. In *Deming* the Supreme Court of the United States, in exercising civilian control over the military, held that an improperly constituted court-martial did not have jurisdiction to try an accused. In *Schneider*, the military similarly relies on an improperly constituted court-martial to convict a soldier who, as noted, was acquitted previously by a civilian court for misconduct based on the same facts.

This case provides the Supreme Court with an opportunity to remind military officials that they must conduct court-martial proceedings strictly in accordance with the statutory guidelines set forth by the Congress in the Uniform Code of Military Justice. A decision by the Supreme Court emphasizing this point, as the Court did in *Deming*, will encourage military courts to follow the statutory guidelines in conducting courts-martial, and will reaffirm the important concept of civilian control of the military and the fact that the Supreme Court of the United States is conscious of its responsibility in this regard.

C. Double Jeopardy

The government's arguments against applying the doctrine of collateral estoppel are equally misleading. The thrust of *Heath v. Alabama*, 474 U.S. 82 (1985) and *Abbate v. United States*, 359 U.S. 187 (1959) both deal with cases of *autrefois convict*. And, in those cases, the defendants were found to have violated the "peace and dignity" and to have committed "offenses." (Brief in Opp. 9) But, here, is a case of *autrefois acquit*. Said another way, no offense was committed. No peace or dignity was violated. The error that the military courts committed was to claim that despite that and despite Justice O'Connor's reasoning in *Heath* "they" are not collaterally estopped because this principle of law does not apply to them.

What is being challenged here, in the broader context of double jeopardy, is the willful abandonment of the normal, sound practices and precepts of law by the military that the rest of the citizenry takes for granted. Again, the government merely asserts that issues that went to the very heart of the matter adjudicated by the Missouri court were not resolved. They were resolved. If the State of Missouri thought perjury had been committed, then they would have prosecuted the petitioner for that. They did not. What the state court jurors believed was clear and unambiguous, namely, that petitioner did not commit the offenses charged.

The government's attempt to redefine petitioner's argument by suggesting that the level of cooperation between authorities warrants "a different result" is ill-advised. (Brief in Opp. 9) This case does not need more fabrication on the part of the government to further cloud the issues. Petitioner does suggest, however, that such Orwellian tactics are totally out of place in this forum.

In the entire recorded history of the Military Justice System there is not one case where a defendant was retried after having been acquitted by a civilian court, until now. Now, the government would have this Court believe that this is commonplace.

The government would have this Court believe that a single case, *United States v. Cowan*, 34 M.J. 258 (CMA 1992), should act as the appropriate justification for allowing a federal officer to override an entire body of civil law. The government would have this Court believe that a convening authority because he "did not exceed the power granted under the Uniform Code of Military Justice," should be allowed to set himself up as being in a better position to judge domestic relations issues than the duly appointed state judges. *Id.* at 260. Conveniently, *Cowan* relies only on military cases to come to this conclusion. Despite the fact that the United States Court of Military Appeals admits that they "do not find an express

grant" of such powers, the government wants this power to extend even to those issues already decided by civilian judges. What the military gets, if this decision stands, is the express power to regulate every domestic dispute that involves a military person by allowing the commander to decide what party should get what part of the service person's pay check.

One of the stipulations enunciated in *Cowan* is that the "conditions cannot: (1) increase the severity of the sentence." *Id.* In fact, the convening authority's action increased the severity of the sentence. The real effect of returning $30,000, annually, to the petitioner, but denying him the ability to use those funds by mandating that they be sent to his ex-wife, is to cause him to pay taxes at a $30,000 higher rate on *all* of his income; in petitioner's case this amounts to having to pay an additional $667 in federal income taxes. Because the convening authority is not in a position to view the entire domestic situation, he can not necessarily be aware of all the consequences of his actions. *See United States v. Estrella*, 35 M.J. 836 (ACMR 1992) and *United States v. Wright*, 35 M.J. 899, 902 n.6 (ACMR 1992).

Thus, in real terms, petitioner is caused to pay back more to the government—$667 in additional income taxes—as a result of the convening authority's "clemency" than would have been the case absent such "clemency." This, of course, is no more than a fine by a different name. While the amount in this case is small, the principle is large.

D. Civilian Review of the Military

The whole point of civilian review of the military is to prevent flagrant abuses of power and such blatantly arrogant excesses. Petitioner contends categorically that he is innocent of all the charges. The proper civilian authorities examined all the same issues in open court and petitioner was acquitted. Only the improper conduct of

the military judicial system allowed the very same evidence to be used a second time securing thereby a conviction. The Army has, so far, proven to itself that it can do and say whatever it wants to.

CONCLUSION

The government has failed to provide adequate explanations for the Army's continued lack of accountability. In a lopsided appeal to this Court's sensibilities that attempts to paint petitioner as a criminal, and thus not worthy of the due process of the law, rather than focusing on the important new powers the military has garnered unto itself, the government fails to justify why it thinks it can now retry any service person at will, ignore basic principles of law like collateral estoppel, or run rampant over the basic due process rights accorded all the citizens. Finally, in failing to follow Congressional intent, the law set forth in the Uniform Code of Military Justice, and its long tradition of using only panel members senior to the accused, and even its own rules against increasing sentence severity, the government demonstrates its arrogant disregard for the statutory nature of Article I courts.

This case presents an opportunity for this Court to curb these excesses. Petitioner fervently hopes the Court will accept his Petition for a Writ of Certiorari and grant the appropriate relief.

Respectfully submitted,

JAN HORBALY
5310 Renaissance Court
Burke, Virginia 22015
(703) 978-7909
Counsel for Petitioner

Date: May 18, 1994